Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 36 ST. LOUIS, MO., MARCH 17, 1893. No. 11

Central Law Journal.

A LEGAL WEEKLY NEWSPAPER.

Published by

Central Law Journal Company,

919 OLIVE ST., ST. LOUIS, MO.

To whom all communication should be addressed.

Subscription price, FIVE DOLLARS per annum, in advance. Single numbers, TWENTY-FIVE CENTS.

Entered at the post-office, St. Louis, Mo., as second-class matter.

CONTENTS.

Central Law Journal.

ST. LOUIS, MO., MARCH 17, 1893.

The daily papers make report that the divorce laws of South Dakota have been changed by the present legislature. If this is true, the people of that State as well as elsewhere have cause for sincere congratulation. The divorce laws of the State mentioned have long been a public scandal, in one respect at least, viz., that requiring but ninety days' residence in the State in order to gain the right to sue for divorce. It is but justice to say that in some respects the divorce laws of that State are more commendable than those of other States. For instance, the grounds for divorce defined in the statute are only six, and none of them are trivial, and there is no mischievous clause, as in some others, allowing divorce to be granted "in the discretion of the judge." But in the features of length of residence required, coupled with the holdings of the courts that a man may comply with the statutory requirement and be "in good faith a resident of the State" by simply staying at a hotel as a transient guest, and that publication in a local newspaper is legal notice to a defendant, the courts of that State have been subjected to the grossest abuses. If the law is changed, that State will cease to be the Mecca for parties with divorce intentions, from all over the country.

United States Circuit Judge Jackson, in New York Construction Co. v. Simon, refuses to follow Judge Wallace in Bentlif v. Finance Corp., 44 Fed. Rep. 667, upon a controverted question growing out of the new Removal of Causes Act. In the latter case it was held that the removing party could question the service upon him under which he was brought into the State court. This ruling was followed by other federal courts. Judge Jackson, however, held that it is only the controversy which is to be removed and that there is nothing in the removal acts which permits questions to be raised as to service of process in the State court. When the defendant, of his own motion, transfers a suit to the jurisdiction of his own choice he should not be heard there to say that he was not properly brought into the State court. We quite agree with the National Corporation Reporter which says that "the rule announced by Judge Jackson prevailing in the Sixth Circuit is evidently the sounder, and should be followed by the other circuits until the point is set at rest by the Supreme Court of the United States."

The *Northwestern Law Review* calls attention to the novel point involved in a recent case (Dunton v. Dunton), decided by the Supreme Court of Victoria, wherein they hold that the agreement of a divorced husband to pay a stipulated monthly sum to his divorced wife, on consideration that she "shall conduct herself with sobriety and in a respectable, orderly and virtuous manner," is a binding contract and not *nudum pactum*. The court holds that as she was under no legal obligation not to get drunk or consort with evil persons, her promise to abstain from such conduct was a sufficient consideration to support the defendant's promise.

A dissenting justice took the ground that the promise is too vague and indefinite to be enforceable, and so it seems to us. What meaning is to be attached to the words "sobriety," "respectable," "orderly," "virtuous." And who is to say whether the plaintiff has in fact been sober, respectable, orderly and virtuous? The case differs essentially from those where the promise is to do or not to do a definite thing, as to abstain from the use of tobacco or intoxicants, which was enforced in Hamer v. Sidway, 32 Cent. L. J. 523. The case is analogous to White v. Bluett, 23 L. J. Ex. 16 where a promise on the part of a son "not to bore" his father was inadequate to support a promise from the father to the son. Yet the son had as good a right to bore his father as the divorced wife had LOT to live riotously, while in point of definiteness the promise of the son is not so vague as that of the divorced wife.

NOTES OF RECENT DECISIONS.

CONFLICT OF LAWS—MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.—Under the common law both in Alabama and Mississippi a master is not liable for an injury

inflicted on one servant through the negligence of a fellow-servant. In Alabama this rule is modified by the employer's liability act, but no similar law is in force in Mississippi. In Alabama G. S. Ry. Co. v. Carroll, 11 South. Rep. 803, decided by the Supreme Court of Alabama, the plaintiff was injured while employed on defendant's railroad as a brakeman, the injury being sustained in Mississippi through the negligence of his fellow-servants. Plaintiff was a citizen of Alabama and was working for defendant under a contract made in that State, and defendant was a corporation organized under the laws of the same State. It was held that the plaintiff could not recover in Alabama for the injuries, the action not being maintainable in Mississippi; and the fact that the negligence which produced the casualty transpired in Alabama will not take the case out of the general rule. The court considered that the fact that the contract between the parties was made in Alabama does not make the employer's liability act a part of the contract so that a failure to perform any of the duties prescribed by the act would render defendant liable for any consequent injury wherever received. McClellan, J., for the court, filed an exhaustive opinion.

CRIMINAL TRIAL—EVIDENCE—LETTERS OBTAINED BY DETECTIVE.—One point in the case of Siebert v. People, 32 N. E. Rep. decided by the Supreme Court of Illinois, is of special interest. It is held that the fact that letters were taken from defendant's room by a detective without authority of law and without any warrant or order of court does not render them inadmissible in evidence for the prosecution. The introduction of the letters in evidence was objected to on the ground that they were obtained by unlawful seizure, in violation of the rights of the defendant Siebert; and reliance was placed on the case of Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. Rep. 524. The court conceded that the letters might have been obtained by artifice and perhaps unlawfully, yet they did not find it necessary to enter upon an elaborate discussion of the admissibility of the evidence, as they had recently had occasion to go over the same question in Gindrat v. People, 27 N. E. Rep. 1085, the decision in which settles the question involved here. After citing several cases it is said in the above case "we think that the case last cited, as well as the present case, are clearly distinguishable from Boyd v. U. S. In the latter case the unconstitutional and erroneous order, process, and procedure of the trial court compelled the complainants to produce evidence against themselves, and such order, process, and procedure were also held to be tantamount to an unreasonable search and seizure; while here, and in other cases cited, the question of illegality was raised collaterally, and the court exercised no compulsion whatever, to produce evidence from the defendants, and neither made orders nor issued process authorizing or purporting to authorize a search of the premises, or a seizure of property or papers, but simply admitted evidence which was offered, without stopping to inquire whether possession of it had been obtained lawfully or unlawfully. Courts, in the administration of criminal law, are not accustomed to be over-sensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent or pertinent, and not subversive of some constitutional or legal right." In Greenl. Ev. (Redf. Ed.) § 254, it is said: Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they are obtained, — whether lawfully or unlawfully; nor will it form an issue to determine that question.

MUNICIPAL CORPORATION—CITY LICENSE—WATER TANKS—REVOCATION.—In Savage v. City of Salem, 31 Pac. Rep. 832, the Supreme Court of Oregon hold that tanks erected on the streets of a city to supply water for street sprinkling are for a public purpose and therefore it is within the power of the city council to license their erection, and that where a person has erected tanks for that purpose under license from a city, the city cannot revoke the license and remove the tanks without compensating him. Bean, J., says:

The contention for appellant is—First, that the city had no power or authority to authorize the erection of these water tanks in the streets, because they were to be used for private purposes, and were

therefore nuisances *per se*, which could be abated at any time; and, second, if this is not so, the permission to erect them was but a mere license, revocable at the pleasure of the city. At the outset it is well to note that, this case is unembarrassed by any question as to the right or remedy of an abutting property owner, or of a private individual, who has suffered some injury special to himself, and not in common with the public, from the erection or obstruction in question, but is solely a question between the municipality, which authorized the alleged obstruction and the licensee; and hence many of the authorities cited and relied on by the defendant are not applicable to the facts of this case, or in point, and the language of the opinions in these, as in all cases, must be interpreted in the light of the particular facts as presented to the court.

As a general rule, it has been said that "public highways belong, from side to side, and end to end, to the public," (State v. Berdetta, 73 Ind. 185; Elliott, Roads & S. 478;) and hence any unauthorized, permanent erection or structure which materially encroaches upon a public street or highway, and impedes or interferes with travel is a nuisance *per se*, and may be abated as such, notwithstanding ample space is left for passage by the public. But it now seems settled that municipal authorities, which possess, under their charters, general control over the streets, have the power and may authorize and render lawful obstructions and erections therein for a public purpose, which otherwise would be deemed nuisances, on the ground that such erections or structures are merely putting the street to a new and improved use, as demanded and required by the necessities of the times and the modern conveniences and appliances. It is upon this principle that the right to grant franchises authorizing the use of the streets for water and gas pipes, for the construction and operation of street railways, the erection of water hydrants and lamp-posts of telegraph, telephone, electric-light and railway poles, and similar structures, is maintained and now generally recognized and upheld by the courts. 2 Dill. Mun. Corp. §§ 657-697; Keasby, Elect. Wires, 86, 89; Thomp. Elect. §§ 26, 28. Since a municipal corporation holds its control and power over the streets in trust for the public, it has no authority to authorize or permit private persons or corporations to erect or maintain permanent obstructions therein for purely private purposes (Pettis v. Johnson, 56 Ind. 139; Emerson v. Babcock, 66 Iowa, 257, 23 N. W. Rep. 656; Farrel v. Mayor, 5 N. Y. Supp. 672); but it may authorize such erections or structures by private persons or corporations, for the purpose of serving the public, for private gain; and in such case, although such structures may in fact, be or become a public nuisance, and liable to abatement as such, they connot be held to be a nuisance *per se*. "It is a legal solecism to call that a 'public nuisance' which is maintained by public authority." Harris v. Thompson, 9 Barb. 350. Hence, in Com. v. City of Boston, 97 Mass. 555, it was held that the specifications and decision by the mayor and aldermen of a city through which the lines of an electric telegraph ompany pass, made and recorded, determining the kind and location of the posts and the company in a highway, are conclusive upon the rightfulness of their erection; so that they cannot lawfully be removed by the city or its officers or treated in any manner as a public nuisance. So, where a railroad company, under an act, granting it power to construct its railroad and public highway, occupied a portion of the road, not exceeding the extent allowed by law and obstructed travel on such portion, it was held not to be guilty of a nuisance. Railroad Co. v. Com., 73 Pa. St. 29. To the same effect is Randle v. Railroad Co., 65 Mo. 325. It follows, then, that the water tank in question having been erected by plaintiff, by the authority and permission of the defendant, at the places designated and selected by its agent, and under his supervision they cannot be held to be public nuisances *per se*, if they were erected and maintained for public, and not private, purposes; and this depends upon whether sprinkling the streets of a municipality is a public purpose, or, in other words, a business in which the corporation itself may lawfully engage. There seems scarcely room for two opinions upon this point, so unquestionable is it that street sprinkling is a public purpose. As was said by Pierpoint, J., in West v. Bancroft, 32 Vt. 371, in sustaining the right of the city to construct a reservoir in a street for the purpose of retaining water to be used in sprinkling streets and extinguishing fires: "All those acts which tend to facilitate travel, and add to the ease, comfort, and convenience of the traveler or his beasts, whether it be by cutting down hills, filling ravines, paving roads, erecting watering troughs, or sprinkling the streets are acts which it is proper and often necessary, for the public to do; · · · and no other one of these acts, perhaps, would add so much to the comfort of the passers on the highway, as well as all the inhabitants of the village, as that of sprinkling the streets." And in State v. Reis, 35 Minn. 371, 38 N. W. Rep. 97, it was held that street sprinkling is a "local improvement," for which an assessment may be levied upon the property fronting or abutting upon the street sprinkled, in proportion to its lineal feet frontage, and, in the course of the opinion, Mitchell, J., said: "That street sprinkling is a public purpose is unquestioned." So, too, a public pump in a street has been held not to be a nuisance to an abutting lot owner, when maintained by the city authorities. Lostutter v. City of Aurora, 126 Ind. 436, 26 N. E. Rep. 184. We conclude, therefore, that the water tanks, erected by the plaintiff were not nuisances *per se*, and could not be abated as such and whether they were or had become in fact nuisances was a question for the jury, and its verdict is conclusive upon that matter.

Passing, now, to a consideration of the question as to the right of the city to revoke the license under which plaintiff erected the water tanks, the rule seems to be that after a municipality has granted a license or franchise to a private person or corporation to occupy a portion of a street for public purposes, and the licensee has acted upon such grant and expended money on the faith thereof, the city cannot revoke the license without compensation to the owner, unless the erection or structure so authorized is, or has in fact, by subsequent use, become, an actual nuisance. 1 Dill. Mun. Corp. 314; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303, 8 Atl. Rep. 123; Com. v. City of Boston, 97 Mass. 555. In this case the question as to whether these water tanks were, or by plaintiff's negligence had become, nuisances, was submitted to the jury, and their verdict being against the city, it was not justified in revoking the license and removing the tanks, and must respond in damages to plaintiff for so doing. Judgment of the court below is therefore affirmed.

LIBEL—WORDS CHARGING INTIMACY.—In Collins v. Dispatch Publishing Co., 25 Atl.

Rep. 546, the Supreme Court of Pennsylvania decided that a publication respecting a person employed in the post-office department, which states that complaints have been made by outside parties to the department, asking his dismissal "on account of intimacy with a well-known young local elocutionist," is libelous *per se*. Sterrett, J. says:

As defined in Pittock v. O'Niell, 63 Pa. St. 258, a libel is "any malicious publication, written, printed, or painted, which by words or signs tends to expose a man to ridicule, contempt, hatred, or degredation of character." This definition has been employed in several other cases, among which are Neeb v. Hope, 111 Pa. St. 145, 2 Atl. Rep. 568, and Barr v. Moore, 87 Pa. St. 391. In the latter it was supplemented by the conclusion drawn from a consideration of numerous authorities on the subject in Steele v. Southwick, 1 Amer. Lead. Case. 115, viz.: "That any publication, injurious to the social character of another, and not shown to be true, or to have been justifiably made, is actionable as a false and malicious libel." A still more comprehensive definition, based on many well-considered cases, is that given in 13 Amer. & Eng. Enc. Law, 294: A malicious defamation, expressed in print or writing, or by signs and pictures, tending to blacken the memory of the dead, with an intent to provoke the living, or to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. It may be said generally that language in writing is libelous which denies to a man the possession of some such worthy quality as every man is *a priori* to be taken to possess, or which tends to bring a party into public hatred or disgrace, or to degrade him in society." As is well said in Odger on Libel and Slander (page 1): "The right of every man to have his good name maintained unimpaired is '*a jus in rem*, a right absolute and good against all the world.' " Words which produce any perceptible injury to the reputation of another are called "defamatory;" and such written or printed and published words, if false, constituted a libel. Words, pictures, or signs which on their face "must injure the reputation of the person to whom they refer are [clearly defamatory; and, if false, are actionable, without proof that any particular damage has followed from their use." *Id.* The fact that words employed by a defendant in any particular case have perceptibly injured the plaintiff's reputation may be either presumed from the nature of the words themselves, or proved by evidence of their consequences. For obvious reasons, the presumption that words are defamatory arises much more readily in cases of libel than in cases of slander. Many words which if printed and published would be presumed to have injured the plaintiff's reputation will not be actionable *per se* if merely spoken. A slander may be uttered in the heat of the moment, and be almost as quickly forgotten; while the same words, written and published, not only show greater deliberation and malice, but are almost certain to inflict greater and more enduring injury. "*Vox emissa volat; litera scripta manet.*" *Id.* 2, 3. Where words are of dubious import, the plaintiff may aver their meaning by innuendo, and the truth of the innuendo is for the jury; but the quality of an alleged libel, as it stands upon the record, either simply, or as explained by averments and innuendos, is purely a question of law for the court; and in civil cases the court is bound to instruct the jury as to whether the publication is libelous, supposing the innuendos to be true. If the publication, considered either by itself or in connection with extrinsic facts, be defamatory, malice is an inference of law, which the jury are bound to find according to the direction of the court. Pittock v. O'Neill, *supra*.

Applying these elementary principles to the facts disclosed by the record, and which the evidence tended to prove, the obvious conclusion is that a proper case for admission to the jury was presented, and that the learned court erred in refusing to take off the nonsuit. The statement or claim, on which the issues of fact were raised by defendant's plea, is sufficient both in form and in substance. Since the procedure act of 1887, abolishing special pleading, less formality than theretofore is required in stating a cause of action. Considered in connection with other portions of the article of which they form a part, the words complained of are clearly defamatory, even without the aid of an innuendo. In its ordinary signification, and as generally applied to persons, the word "intimacy" would be understood to mean a proper friendly relation of the parties; but, as employed in the article referred to, it has, and evidently was intended to have, a very different meaning. It conveys the idea of an improper relation, an intimacy at least disreputable and degrading, and tending to such an extent to unfit the plaintiff for the position he held that "outside parties" were prompted to make complaint to the post-office department, and request his dismissal. It is impossible to read the article without being constrained to reach that conclusion. On their face, without more, the words complained of are defamatory and actionable. In the statement they are laid with an innuendo which, if true, intensifies and greatly aggravates their meaning. As was said in Hayes v. Press Co., 127 Pa. St. 648, 18 Atl. Rep. 331: "The office of an innuendo is to aver the meaning of the language published; but, if the common understanding of mankind takes hold of the published words, and at once, without difficulty, applies a libelous meaning to them, an innuendo is not needed, and, if used, may be treated as surplusage." In this case there was some evidence tending to sustain the meaning averred in the innuendo; but, as already stated, the words upon their face, without invoking the aid of the innuendo, are defamatory and actionable, and, if the case had gone to the jury, they should have been so instructed.

INJURIES FROM POLLUTED WATER—LANDLORD AND TENANT.

In the case of Fletcher v. Ryland,[1] Mr. Justice Blackburn said that the person whose * * * cellar is invaded by the filth of his neighbor's privy * * * is damnified without any fault of his own. The doctrine of that case was laid down in May v. Burdett,[2] in 1846, and from the authority of that case it appears (1), that a thing must be kept (2), that it must be capable of doing harm, the danger of which must be known to the keeper, and (3), keeping after such knowledge is the *gist* of

[1] L. R. 1 Ex. 265.
[2] 3 Q. B. 101.

the action. To these is here added the element of landlord and tenant, and within the limits of the latter will this article be confined.

First. The liability of a landlord for injuries done to third persons by escape of polluted water from to the premises of the latter. The landlord must either cause the injury directly, or put the thing in motion which does the harm, to make him liable in damages to the injured party. He may become liable by using a harmful thing, or by using a harmless thing in a wrongful manner. Or, his liability may result from authorizing another to make such use of the thing; and that authority may come from a knowledge of certain facts by him. So, as between landlord and tenant, when an injury of the kind mentioned is sustained, the question is, who caused it? Upon whom shall the blame be made to rest? The answer is, upon him who keeps a dangerous thing after knowing its capacity to do harm.

It will be assumed that filthy water emitting foul odors is dangerous when it has invaded the cellar of one's neighbor. And then the question comes, not necessarily who let it escape, but who kept it in such a manner to permit its escape? Who is at fault? Blame seeks the party, who in a legal sense, is the keeper of the nuisance, and the keeper is clearly the first at fault. A case in point decided by the Supreme Judicial Court of Massachusetts is important.[3] The defendant built cesspools on a private way on its own land and laid from them drain pipes to a ten-inch pipe which emptied into a ditch on the defendant's land. This ditch connected with a brook at a point nearly five hundred feet from the land of the plaintiff. These cesspools were connected, with houses owned by defendant, by pipes for carrying off sink water,[3] and surface water from defendants land but the pipes had no connection with privy vaults thereon. These vaults had no outlets, and there were no cisterns, but there were six wells on the land. The injury complained of by the plaintiff was shown to arise from the overflow of the brook and a box drain through which it ran on his land, the water so escaping running into the cellar of a house on his land, thereby making the house uninhabitable by reason of the water and of the offensive odors from it. The jury brought in a verdict for plaintiff and the court refused to disturb it.

There was evidence that the natural drainage from plaintiffs land would carry with it filth deposited thereon by his tenants, into the same brook and drain. As to that the court said, if the plaintiff could show specifically that the defendant unlawfully polluted the water, the latter could not rely upon pollution of the same to some degree by the plaintiff, as a defense to his own act. But that the defendant in drawing water from the wells and allowing it to pass from the houses through an artificial channel into the brook at a point on his own land would be exercising reasonable use of the same, provided the volume of water were not so increased beyond the natural capacity of the brook.[4]

The defendant proved that he had no control over the premises which were let to tenants at will who used them. But the court charged the jury, that, if defendant constructed the houses, wells, sinks, and drains aadpted and intended for use, and there were no other wells, sinks, and drains provided and adapted for use by the tenants, and the tenants in making a necessary and reasonable use of the same, caused the water and offensive odors to exist in plaintiff's cellar, he could maintain his action, the ordinary relation of landlord and tenant and the want of control of the premises, to the contrary, notwithstanding. And that damages flowing from injuries within plaintiff's control or from acts of other persons could be only nominal. It will be observed that the ordinary use of the premises, such a use as the landlord intended when he put tenants into control of them caused the injury to the plaintiff. He kept a thing capable of becoming a nuisance and put the thing in motion by the letting of his houses. He may never have ascertained the capacity of the brook, but he must be presumed to intend the consequences following the use made of it. Knowledge is, therefore, imputed to him. Upon this point Humphries

[3] Jackman v. Arlington Mills, 137 Mass. 277. See Owings v. Jones, 9 Md. 108; Gandy v. Jubber, 5 B. & Sm. 78; Brown v. Russell, L. R. 3 Q. B. 251.

[4] It seems that instructions as to the volume of water should go to the point of overtaxing the stream rather than to the fact that the volume of water has been greatly enlarged by the act of the defendant.

v. Cousins,[5] is illustrative. In that case a defective drain existed on leased premises subsequent to the letting, and its existence was unknown to the defendant. He was held liable for injuries sustained by the adjoining owner by reason of the use of a defective drain. The court said that the defendant must show some authority for discharging filthy water onto his neighbors premises, to escape damages resulting from it. Marshall v. Cohen,[6] was a case where the landlord was not only affected by knowledge of the dangerous thing, but had re-let a part of the premises on which it existed, after coming into possession of such knowledge, and therefore kept the nuisance. The fault attributable to the landlord was the permitting of an unreasonable and careless use of a water closet. It was not defective *per se*, but was made to do harm by putting large quantities of "stuff" into it.

The court rested the decision upon agency, or it may be said, upon the doctrine of causation.[7] And upon this doctrine stands the decision in Jackman v. The Arlington Mills, *supra*, without passing into the domain of negligence. The intervening party in those cases was only the instrument by which the keeper of the offending thing caused the harm done to his neighbor. And those cases show that keeping is simply an act of commission or omission in the use of one's premises, with reference to a particular thing. But the right to such a user is clear within proper legal limits, and this is suggested in the Massachusetts case by the term reasonable and necessary use. And in a later case[8] decided in that State, Holmes, J., says, that the tendency of the courts is to look to the party whose act caused the injury. There the building on leased premises was so constructed as to permit the escape of snow on its roof, into the street. An attempt was made to hold the landlord at fault for not placing an iron guard on the building to prevent snow from falling from the roof, but the attempt failed notwithstanding the landlord had the right to enter to make repairs. The falling of snow upon the roof could not be chargeable to the lessor, and the roof in its construction and use could do no harm if cared for by the lessee. This question of the construction and condition of the thing in use upon leased premises, was raised in Wunder v. McLean,[9] because such facts were withheld from the jury. The action was to recover damages for injuries sustained by plaintiff by reason of the leakage of a cesspool near to his premises and on the property of the defendant, thereby rendering plaintiff's cellar unfit for use.

Defendant relied upon three facts as a defense; (1) want of evidence that the premises were out of repair; (2), that they were leased; and (3), that defendant had no right to enter upon them to make repairs. The cesspool was a lawful one and had been cleansed by defendant upon notice to him by the board of health prior to the action. In the opinion of the court, it says in regard to the cesspool: "If it was properly built, and in good repair when the tenants took possession, the landlord ought not to be held responsible for the consequences of his tenant's neglect. On the other hand, if the cesspool was defectively built or was out of repair when the tenant was put into possession, the mere fact of the tenant's occupancy, when the injury arises, will not relieve the landlord from the conseqences of his own negligence. He is liable because of the defective construction or condition at and before the tenancy began, and this liability continues notwithstanding the possession of the tenant. He cannot escape liability for an existing nuisance by leasing the property to a tenant, and putting him into possession.[10] It was held error not to submit to the jury the facts relating to construction and actual repairs of the cesspool at the time of the lease and entry thereunder. If the cesspool were then in good repair and it was adequate to the ordinary use contemplated when it was constructed, certainly the landlord was not the keeper of a nuisance, and could not be made liable for an unreasonable use made of it by his tenant, provided the lessor had not violated a municipal ordinance in locating it on his premises,[11] and then upon different grounds. And especially is it true where the use of the premises by the tenant

[5] L. R. 2 C. P. D. 239.

[6] 44 Ga. 489.

[7] Thomas v. Winchester, 6 N. Y. B. 397; Scott v. Shepherd, 2 W. Bl. 892.

[8] Clifford v. The Atlantic Cotton Mills, 146 Mass. 47.

[9] 134 Pa. St. 334.

[10] See Knauss v. Brea, 107 Pa. St. 85, on this point.

[11] Fow v. Roberts, 108 Pa. St. 489.

(in a manner which gives offense) is subject to the control of the tenant, as it was in the case of Rich v. Basterfield,[12] where the use of a chimney which was properly built was the cause of the offense alleged. In speaking of the use in the opinion of the court, it says: "It being therefore, quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance,—it seems impossible to say that the tenant, was in any sense, the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant, is that he enabled the tenant to make fires, if he pleased." "The case, then, resting, not upon the erection of the chimney, but upon the subsequent use of it by the tenant, can the defendant, his landlord, be held to be guilty of the nuisance?"

The verdict was entered for the defendant on the plea of not guilty, as well as on the issue of not possessed, having reference to time when the nuisance was created. And, *a fortiori*, is the landlord exempt from all liability where the tenant in his lease agrees to make all needful internal and external repairs to the premises.[13] And upon the question of care to be exercised by a landlord who rents premises with cesspools upon them, it was said by Taunton, J., in Rex v. Pedley:[14] "I hold it to have been the duty of the landlord either to exact from his tenants an engagement that they would cleanse these privies, or to reserve to himself a right to enter for that purpose." Littledale, J., said: "If a man demise with no nuisance upon the land, and a tenant commits a new nuisance, the landlord is not liable."

Second. As to the liability of the tenant to third persons.—It is clear from the foregoing authorities that the tenant is liable where the landlord is not.[15] But taking possession under a lease does not necessarily transfer the entire liability to the tenant. The question is, did he cause the nuisance? If he takes premises with a nuisance on them, he should abate it, if he has the power to do so; otherwise he is liable for its continuance,[16] equally with the landlord, in the sense that either one is a wrong-doer. And, as between the two, if their agreement requires repairs by the tenant, he alone must respond to the injured party.[17] And whether damages result from the faulty construction of a water closet and its being out of repair, or from the improper use of it by occupants of the building in which it is situated, is a question for the jury, and evidence submitted to it upon upon which it finds for the plaintiff will not be disturbed.[18] A landlord is not liable to a tenant occupying a lower floor for injuries sustained by the tenant by reason of water falling from a water closet used by the upper tenant where the evidence is conflicting as to whether or not the overflow of water was the result of improper construction and repair, or of the negligent use of the closet by the upper tenant or his servants, according to White v. Montgomery.[19]

Conclusion.—The mere relation of landlord and tenant is not decisive of the question of liability. It may be important where the offense continues after such relation is established, as affecting joint liability. It is important where possession selects the party as committing the offense; and when the selection is made from the evidence, the relation of landlord and tenant may be eliminated and the offending party may be treated as a trespasser. The elements which determine a selection are conspicuous in the authorities referred to, and in Taylor's Landlord and Tenant,[20] where the principle involved is well illustrated. The party in possession cannot escape liability on the ground of ignorance of the offending things upon his premises. He is bound to know of their condition, and to use the care and prudence chargeable to humanity in controlling them. No man can discharge filthy water onto his neighbor's premises without clearly showing the right in him so to do. And that right may be prescriptive.

C. A. BUCKNAM.

Minneapolis, Minn.

[12] 4 C. B. 783.

[13] Pretty v. Bickmore, L. R. 8 C. P. 401; Leonard v. Storer, 115 Mass. 86.

[14] 3 N. & M. 623, 1 Ad. & El. 822.

[15] Clifford v. The Atlantic Cotton Mills, *supra*; Dalay v. Savage, 145 Mass. 47; Rich v. Basterfield, *supra*.

[16] Rex v. Pedley, *supra*; Joyce v. Martin, 15 R. I. 558.

[17] Leonard v. Storer, *supra*.

[18] White v. Montgomery, 58 Ga. 204; See Ross v. Fedden, L. R. 7 Q. B. 661.

[19] See Simonton v. Loring, 68 Me. 164.

[20] Vol. 2, p. 1280 *et seq.*

EXEMPTION FROM CIVIL PROCESS — PARTY TO FOREIGN SUIT—TAKING DEPOSITIONS.

PARKER V. MARCO.

Court of Appeals of New York, January 17, 1893.

A party to a suit in a federal court in another State who attends the taking of depositions before a notary in New York to be read in that suit, is exempt from service of civil process in a suit begun against him while in New York, for the same cause of action. Gray J., dissenting.

MAYNARD, J.: The defendant is a resident of South Carolina, and an action had been there brought against him in the federal circuit court by the plaintiff, who is a resident of this State. On April 6, 1892, the defendant came to the city of New York, at the instance of the plaintiff, to attend an examination of the plaintiff and his witnesses before a notary public, which, by the agreement of the counsel for the respective parties, had been set down for that date. The plaintiff procured the defendant's assent to the examination upon the statement that he desired to be in readiness to try the cause at the ensuing April circuit, to be held at the city of Charleston. When the time for taking the testimony arrived, the defendant was informed by plaintiff's counsel that he had abandoned his intention to take the evidence as proposed, for the reason that, on account of sickness in his (the counsel's) family, the plaintiff would not be prepared to go to trial at the April circuit, and he expected to be able to produce his witnesses in court when the trial should take place at a subsequent term. It was then late in the afternoon, and the defendant returned to his hotel, and remained over night, and the next morning started for his home in South Carolina. He was intercepted at the ferry by a process server, who served him with a summons in an action brought by the plaintiff in the supreme court of this State for the same cause of action at issue in the federal court in South Carolina. The defendant had no business in New York, except that which related to the proposed examination. The defendant has appealed from an order of the general term reversing an order of the special term, which set aside the service of the summons upon the ground that, when served, he was privileged from service.

Under section 863 of the Revised Statutes of the United States the plaintiff had an absolute right to take the testimony of his witnesses in this State, to be used upon the trial of the action in South Carolina, upon giving reasonable notice to the defendant. The compulsory character of the proceeding was not affected by the waiver of notice and the fixing of the time by the agreement of parties. Plimpton v. Winslow, 9 Fed. Rep. 365. The same section provided that a person may be required to appear and testify before the notary in the same manner as witnesses in open court, and section 915 of our own Code authorizes any State judge to issue a subpœna to compel the attendance of a witness in such a case. In the trial of the action the notary thus becomes the arm of the court, and, as was held in *Re* Rindskopf, 24 Fed. Rep. 542, represents the court *pro hac vice*.

The privilege of a suitor or witness to be exempt from service of process while without the jurisdiction of his residence for the purpose of attending court in an action to which he is a party, or in which he is to be sworn as a witness, is a very ancient one. Y. B. 13, Hen. IV., I. B. Vin. Abr. "Privilege." It has always been held to extend to every proceeding of a judicial nature taken in or emanating from a duly-constituted tribunal which directly relates to the trial of the issues involved. It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice. Person v. Grier, 66 N. Y. 124; Matthews v. Tufts, 87 N. Y. 568. At common law a writ of privilege or protection would be granted to the party or witness by the court in which the action was pending, which would be respected by all other courts. We cannot find that the power to issue such a writ has been abrogated by legislation, and it doubtless exists, and the writ may still be granted by courts possessing a common-law jurisdiction; but, while the granting of the writ is proper, it is not necessary for the enjoyment of the privilege, and the only office which it can perform is to afford "convenient and authentic notice to those about to do what would be a violation of the privilege, and to set it forth, and command due respect to it." Bridges v. Sheldon, 7 Fed. Rep. 44. The tendency has been not to restrict, but to enlarge, the right of privilege so as to afford full protection to parties and witnesses from all forms of civil process during their attendance at court, and for a reasonable time in going and returning. Larned v. Griffin, 12 Fed. Rep. 592. Hearings before arbitrators, legislative committees, registrars and commissioners in bankruptcy, and examiners and commissioners to take depositions, have all been declared to be embraced within the scope of its application. Bac. Abr. "Privilege;" Sanford v. Chase, 3 Cow. 381; Matthews v. Tufts, *supra*; Hollender v. Hall (Sup.), 13 N. Y. Supp. 758, and 11 N. Y. Supp. 521; Thorp v. Adams (Sup.), 11 N. Y. Supp. 479; Bridges v. Sheldon, Plimpton v. Winslow, and Larned v. Griffin, *supra*. It has even been extended to a suitor returning from an appointment with his solicitor for the purpose of inspecting a paper in his adversary's possession in preparation for an examination before a master (Sidgier v. Birch, 9 Ves. 69); and while attending at the registrar's office with his solicitor, to settle the terms of a decree (Newton v. Askew, 6 Hare, 319); and while attending from another State to hear an argument in his own case in the court of appeals (Pell's Case, 1 Rich. Eq. 419). No good reason can be perceived why the privilege should not be

extended to a party appearing upon the examination of his adversary's witnesses, where the testimony is taken pursuant to the authority of law, and can be read upon the trial with the same force and effect as if it had been taken in open court. It is a proceeding in the cause, which materially affects his rights; and the necessity for his attendance is quite as urgent as it would be if the examination was had at the trial. But we do not think that the question of the necessity of his presence is material. It is the right of the party, as well as his privilege, to be present whenever evidence is to be taken in the action, which may be used for the purpose of affecting its final determination. It is essentially a part of the trial, and should be so regarded so far as it may be necessary for the protection of the suitor. There have been many analogous cases in the federal courts where the right to the privilege has been upheld.

In Bridges v. Sheldon, *supra*, the action was pending in the United States circuit for Vermont. A reference had been ordered to a master to take and state an account. The master, on motion of the plaintiff, had made an order for the taking of a deposition before a commissioner in the State of Iowa. The defendant, while attending before the commissioner in Iowa, was served with process in a suit brought by the plaintiff for the same cause of action as in the federal court. Judge Wheeler, in very strong terms, condemned the procedure, and held that the defendant was absolutely privileged from service, and that the conduct of the plaintiff in causing such service to be made was a contempt of court, and could be punished as such. It seems that in such a case the party has a twofold remedy: He may move in the court, whose privilege has been violated, to punish the party in that court who has been guilty of such violation; or he may move in the court out of which the process has been improperly issued to vacate it, and the motion will be granted.

In Plimpton v. Winslow, *supra*, the suit was pending in the United States circuit for Massachusetts. By agreement of counsel, testimony was taken before a special examiner in New York city, and, while defendant was attending before the examiner, he was sued by the plaintiff in the United States circuit for New York. Judge Blatchford set aside the service, saying: "It is very clear that the motion must be granted. The defendant attended as a party before the examiner. The regularity of the examination was recognized by the attendance of the plaintiff. The defendant had a right to attend upon it in person, whether he was to be himself examined as a witness before Mr. Thomson or not, and he had a right to be protected, while attending upon it, from the service of the papers which were served in this suit. He attended in good faith. The privilege violated was a privilege of the Massachusetts court, and one to be liberally construed for the due administration of justice."

In Larned v. Griffin, *supra*, the defendant was in Massachusetts, attending upon the taking of a deposition under a commission issued out of the superior court of Cook county, Ill., and was arrested upon civil process in an action brought in a State court of Massachusetts, which was afterward removed into the United States Circuit Court. Judge Colt sustained a plea in abatement on the ground that the defendant was exempt from process. In Hollender v. Hall, *supra*, the witness was attending, pursuant to a stipulation before a notary public, to have his deposition taken in an action pending in the United States District Court for the southern district of New York, and the special term set aside the service of process upon him, and its decision was affirmed by the general term of the first department. A distinction is sought to be made between that case and the one at bar, because there the court in which the action was pending existed within the limits of this State, while here it is a court sitting in another State. There does not appear to be any sound principle upon which such discrimination can rest. A federal court exercising its jurisdiction in another State has the same privileges, and can afford to its suitors the same immunities, as a like court sitting in this State. Both exist by virtue of the federal constitution and laws, which are supreme everywhere, and, when taking testimony out of court in this State, both are proceeding under the same act of congress. A party who is brought here in such a proceeding is, we think, entitled to the same protection without regard to the local jurisdiction of the court in which the action is pending. It may be assumed that the plaintiff acted in entire good faith, and that his procedure was not a device to secure the presence of the defendant within the territorial jurisdiction of the courts of this State. In the view we take of the privileges of the defendant, the plaintiff's motive is of no importance. The order of the general term must be reversed, and the order of the special term affirmed, with costs. All concur, except Gray, J., dissenting.

NOTE.—The case of Greer v. Young, 120 Ill. 184, 26 Am. Law Reg. (N. S.) 372, presents a state of facts sufficiently like those of the foregoing case to establish it as a conflicting decision therewith. In that case the plaintiff and defendant were both residents of the State of Missouri, and parties to a suit instituted there. The defendant went to Chicago to attend the taking of depositions to be read in the Missouri suit; after the depositions were closed he was served with process in a suit begun against him by the same plaintiff in Illinois for the same cause of action. The court held that the defendant having gone voluntarily into the State of Illinois was not exempt from service of process. In neither case was there an arrest, nor was the question of enticement into the jurisdiction for the purpose of serving process involved. In the one case the decision seems to have been rested squarely upon the ground that voluntary attendance by a non-resident party for the purpose of taking depositions to be read in a foreign suit, does not exempt

him from service of process, while the other case adopts the opposite rule.

The Illinois court reaffirms the common law rule that parties and witnesses in a law suit shall be exempt from service of process while going to court, attending there, and returning thence, but observes that in nearly all the decisions the rule is limited to cases of arrest on civil process, and cites 1 Tidd (1st Am. Ed.), 174; 3 Bl. Com. m. p. 289; 1 Greenl. Ev. §§ 316, 317; 2 Bouv. Law Dict. 284; Meekins v. Smith, 1 H. Bl. 635; Kinder v. Williams, 4 Term R. 378; Arding v. Flower, 8 Term R. 534; Spence v. Stuart, 3 East, 89; More v. Booth, 3 Ves. Jr. 350; *Ex parte* Hawkins, 4 Ves. Jr. 691; *Ex parte* King, 7 Ves. 313; Sidgier v. Birch, 9 Ves. 69; *Ex parte* Jackson, 15 Ves. 117. This distinction is made in New York; for the rule there is that neither resident witnesses nor resident parties are exempt from service of process in actions in which bail is not required. As to witnesses see Hopkins v. Coburn, 1 Wend. 292; Frisbie v. Young, 11 Hun, 474; as to parties, Schlesinger v. Foxwell, 1 N. Y. City Ct. 461; Jenkins v. Smith, 57 How. Pr. Rep. 171; Matthews v. Puffer, 10 Fed. Rep. 606; so in other States, Case v. Rorabacher, 15 Mich. 537; Wilder v. Welsh, 1 McArthur (D. C.), 566; Massey v. Colville, 45 N. J. L. 119. Thus it appears that as to resident witnesses and parties the New York decisions observe the distinction which the Illinois court conceives to have existed at common law; namely, that the privilege only extended to cases in which bail was required. That court then refers to the case of Matthews v. Tufts, 87 N. Y. 568; and Person v. Grier, 66 N. Y. 124, *obiter dictum*, holding that a non-resident party is entitled to exemption from service of civil process though bail be not required, and disapproves them as "departing from the general current of authority on this subject;" but the court does not indicate the authorities in question, unless it intends the English decisions already referred to, and those were all cases in which the parties were residents, and in which there was no occasion to consider the distinction which exists in New York between the privileges of residents and non-residents. Turning from precedent to principle the court made the following weighty observations by Mulkey J. "The mere service of a summons upon a non-resident (without arrest) when in another State for the purpose of taking depositions to be used in an action to which he is a party in his own State imposes no greater hardship upon him than to be served with process out of his own State when attending to any other kind of business. In either case he is usually afforded ample time to prepare his defense, if he has any. Parties thus circumstanced have no difficulty in getting a temporary postponement on continuance of the cause when necessaay to the attainment of justice or to avert serious loss or inconvenience. It is clear that such a case does not come within the reasons of the rule as laid down in the authorities above cited.

The second ground of decision in the Illinois case, namely, that the taking of depositions before a notary public is not such a proceeding of a judicial nature as will entitle a party attending the same to exemption from service of civil process, may not commend itself as equally forcible. The court draws a distinction between appearances before a master, magistrate, register in bankruptcy, or other person taking testimony under an order of court within its jurisdiction, and appearances before a notary without the jurisdiction of the court. No authorities are cited in support of this distinction. In the case which is the subject of this note, the object of the defendant's presence in New York was to attend the taking of depositions before a notary public, but no question seems to have been raised as to whether an appearance before a notary was such as would entitle a party to the exemption. The decision (16 N. Y. Supp. 325) which the court reverses, was based upon the ground that the exemption extended only to non-resident parties and witnesses attending a trial in New York, and not a mere taking of testimony to be used in a suit pending in another State. But the court of appeals incidentally observes that the effect of Rev. St. U. S. § 863, providing that a person may be required to appear before a notary and testify in the same manner as a witness in open court, makes the notary a representative of the court *pro hac vice*; citing *Re* Rindskopf, 24 Fed. Rep. 542. This would seem to be a sufficient answer to the second ground of decision in the Illinois case, in all cases in which that provision of the revised statute governs. The court then proceeds to to discuss the nature of the proceeding and tribunal which will authorize the exemption and cites several cases, to which may be added the following: depositions taken under order of court, Holmes v. Nelson, 1 Phila. 217; U. S. v. Edme, 9 S. V. R. (Pa.) 147; or of a master in chancery, Dungan v. Miller, 37 N. J. L. 182; attendance before a referee, Clark v. Grant, 2 Wend. (N. Y.) 257; before an examiner in chancery, Huddeson v. Prizer, 9 Phila. 65; before a register in bankruptcy under an order of court, *In re* Kimball, 2 Ben. (U. S.) 38; before commissioners to audit claims against a decedent's estate, Wood v. Neale, 5 Gray (Mass.) 538; before a legislative committee in support of a claim, Thompson's Case, 122 Mass. 428. A person who in good faith attends for the purpose of taking a deposition but who abandons the purpose, is entitled to the exemption. Wetherell v. Seitzinger, 1 Miles (Pa.), 237. The privilege does not extend to a defendant in a criminal prosecution unless the same was set on foot merely for the purpose of bringing him into the jurisdiction and subjecting him to civil process. La Grave's Case, 14 Abb. Pr. (N. S.) 333; Slade v. Joseph, 5 Daly (N. Y.), 187; Benninghoff v. Oswell, 37 How. Pr. (N. Y.) 235; Underwood v. Felter, 6 N. Y. Leg. Obs. 66; Snelling v. Watrous, 2 Paige, 314; Williams v. Bacon, 10 Wend. 636; Hill v. Goodrich, 32 Conn. 588; Stein v. Valkenhuysen, Ellis, Bl. & Ellis, 65; Wells v. Gurney, 8 Barn. & Cres. 769.

CHAPMAN W. MAUPIN.

CORRESPONDENCE.

OBTAINING WRITTEN EVIDENCE FOR USE IN COURT.

To the Editor of the Central Law Journal:

I wish to propound a question upon which you or some of your subscribers may give me some light. It is this: Suppose a written instrument or writing of some kind is in the possession of some one not a party to an action and not within the jurisdiction of the court, and it is desired to introduce the contents of such writing in evidence, how can such evidence be obtained?

The deposition of the party in whose possession the writing is may be taken but can he be compelled to attach a paper belonging to himself to his deposition, and have it taken away, perhaps to another State, especially if the paper be one of value.

I have a case in mind where the books of the agent of an express company in the City of Topeka contain material evidence in a case pending in Missouri.

Certainly the books of an express company cannot be taken out of its possession for the convenience of litigants.

CLINTON J. EVANS.

Topeka, Kansas.

BOOK REVIEWS.

WILLIAMS ON REAL PROPERTY.

The first edition of this work appeared in 1845 and reached its thirteenth edition before the death of the author in 1880. The present is the seventeenth edition but the present editor, the son of the author, claims that it is to a large extent a new book. In preparing it he has "ventured to work with a free hand and to remodel the book after a design of his own." At the same time the editor has "endeavored to harmonize the old matter and the new, so as to carry out, as far as possible, the late author's idea in projecting the original work viz., to write a readable book and one intelligible to a student without previous knowledge of the law."

The book is essentially a student's book, intended as 'a first book for the use of students in conveyancing." It has always been regarded as admirable in its exposition of the elementary principles governing estates and interests in real estate and to-day there is nothing which surpasses it in that regard.

But as a work for the practitioners, especially in this country, it is not so valuable, its citations being entirely of English authorities. It should, however, find a place in every good law library. It consists of one volume of seven hundred pages handsomely prepared. The American publisher is the Boston Book Company, Boston.

GENERAL DIGEST OF THE UNITED STATES.

This volume of about twenty-three hundred pages embraces all the discussions of the principal courts in the United States, England and Canada during the year ending September, 1892. It is Vol. 7 of the series of digests issued by the Co-operative Publishing Company. The book has evidently been prepared with care and diligence. We have no hesitation in commending it to attorneys as a first class digest in every regard.

BEACH ON MODERN EQUITY JURISPRUDENCE.

We have had before us for some time and have made repeated practical use of these volumes. In every instance they have proved accurate and satisfactory. The aim of the author, as declared by him, "to state and to illustrate and distinguish the modern rules of equity in a plain and practical way" has been admirably carried out The treatise of Mr. Pomeroy on the same subject may, perhaps, be more complete in a purely literary point of view, but these two volumes by Mr. Beach contain all that the every day practitioner needs. The subjects or heads of equity are logically presented, the style of the author is clear and concise, the citation of authorities exhibits extensive research, and there appears to be nothing lacking to make this a work of great value to the profession. A feature of especial note is the citation of articles and essays from current law newspapers, though we might better commend the diligence of the auther, in this regard, had he not failed to note in his section on "Following Trust Funds" the very exhaustive essays on that topic which appeared in 31 Cent. L. J. 125, 145. The volumes are exceedingly well printed and bound and contain a first class index. Published by Baker, Voorhis & Company, New York.

BOOKS RECEIVED.

Digest of Insurance Cases Embracing the Decisions of the Supreme and Circuit Courts of the United States, of the Supreme and Appellate Courts of the Various States and Foreign Countries, Upon Disputed Points in Fire, Life, Marine, Accident, and Assessment Insurance, and Affecting Fraternal Benefit Orders. Reference to Annotated Insurance Cases in Editorials in Law Journals on Insurance Cases. For the year Ending October 31, 1892. By John A. Finch, of the Indianapolis Bar. Indianapolis: The Rough Notes Co., Publishers. 1893.

Negligence of Imposed Duties, Carriers of Passengers, by Charles A. Ray, LL.D. Ex-Justice of Supreme Court of Indiana. Author of Negligence of Imposed Duties, Personal and Contractual Limitations. Rochester, N. Y. The Lawyers' Co-operative Publishing Company, 1893.

The Law of Assignment for the Benefit of Creditors in the State of Illinois: Being an Analysis of an act Concerning Voluntary Assignments, Approved May 22, 1877, in Force July 1, 1877, and Amended by Acts in Force July 1, 1879, and July 1, 1883. And a Collation of all the Decisions of the Supreme and Appellate Courts of Illinois in which the Act has been Construed. By Sydney Richmond Taber, of the Chicago Bar, Chicago: E. B. Myers & Company, Law Publishers. 1893.

Practice in Courts of Review that Substantially Follow the Colorado Procedure. By John C. Fitnam, Esq., of the Colorado Bar. Chicago: E. B. Myers & Company, Law Publishers. 1893.

HUMORS OF THE LAW.

It was just after the first sickening crash of the collision, and the air was filled with shrieks and groans, mingled with the hiss of escaping steam.

The dark, sinister man with the smooth face lay motionless where the shock had thrown him. Around him were scattered broken timbers and twisted iron rods, but by a seeming miracle the debris had not fallen upon him and his limbs were free.

"He's dead," sadly whispered the rescuer who saw him first.

The lips of the dark, sinster man moved.

"Not by a jugful," he observed audibly.

The rescuer hastened forward. "Are you hurt?" he anxiously inquired.

"Nope."

The dark man was positive. "Not a scratch," he declared.

The rescuer was unable to express an exclamation of surprise.

"Well, why don't you get out of the wreck?"

The sinister man gazed at the twinkling stars above him.

"I just about know my business," he calmly replied. "I've been in collisions before. I'll stay right here where they threw me until I'm moved. Then perhaps"—a faint smile played about his lips—"the company can't work the contributory negligence racket on me when I sue for damages. Oh, no, I don't object to your carrying me away if you like, but I call on you to witness that I take no active part in the process myself. I know my business."

And the man with a sinister face laughed a hard metallic laugh.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATORS — Deposits in Bank.—Where an administrator deposits to his own credit, in a bank, funds of the estate, without any designation of his representative capacity, and afterwards the bank fails, he is personally liable for the loss, regardless of care or prudence, even though he has no other money in such bank.—IN RE ARGUELLO'S ESTATE, Cal., 31 Pac. Rep. 937.

2. ADMIRALTY — Maritime Liens.—Where towage services are rendered and supplies furnished to a foreign vessel, on the order of her foreign special owner, by one knowing or having reason to know that as between the general and special owner the latter is solely liable, and nothing is said as to the credit given, no maritime lien will be implied, though on the furnisher's books the charge is entered against the vessel "and owners."—THE STROMA, U. S. C. C. of App., 53 Fed. Rep. 281.

3. ADMIRALTY — Maritime Lien—Waiver.—An agreement to accept, in payment for certain machinery furnished a steam tug under a written contract, a promissory note, payable four months after date, does not in itself constitute a waiver of the lien against the tug for the contract price, especially where it is not claimed that any such waiver was ever contemplated by the parties.—THE PIONEER, U. S. D. C. (N. J.), 53 Fed. Rep. 279.

4. ADMIRALTY—Shipping—Bill of Lading.—A bill of lading which exempts the ship and owner from loss arising from any danger or accident incident "to navigation or transportation, receipt, delivery, storage, or wharfage, any fire, collision, explosion of any kind wetting, combustion, or heating," does not include exemption from liability in general average. Exemption from the ordinary liabilities of a carrier should be expressed in clear and definite language.—THE ROANOKE, U. S. D. C. (Wis.), 53 Fed. Rep. 270.

5. APPEAL—Jurisdiction.—In an action to recover damages for being deprived of the use of certain lands claimed under a lease, defendants filed a cross complaint, asking judgment against plaintiffs for rent of the lands, and that the rent be declared a lien on the crops planted by plaintiff, and then growing on the land: Held, under Acts 1891, p. 39, § 1, giving jurisdiction to the appellate court, "to cases for the recovery of money only," no appeal in this action will lie to such court, the relief sought by the cross complaint being equitable in its nature.—HUBER V. BECK, Ind., 32 N. E. Rep. 1025.

6. APPEAL — Questions Determined.—Matters finally determined by suit on appeal cannot be reopened where such matters were either actually adjudicated, or could have been adjudicated, in such suit.—CARTER V. HOUGH, Va., 16 S. E. Rep. 665.

7. APPEAL—Record.—Where an appeal is taken from an order denying a motion by defendants for a new trial, it is not proper practice for plaintiff to move to dismiss the appeal on the ground that the notice of motion for new trial was not given in time, but such objection to the notice may properly be considered on the hearing of the appeal.—GUMPEL V. CASTAGNETTO, Cal., 31 Pac. Rep. 898.

18. ARBITRATION—Examination.—Where an award is excepted to on the ground that the arbitrators acted improperly in bringing a person before them, and taking his statement as a witness in the case, without notice to the excepting party, and without his knowledge or consent, after having announced that the taking of testimony was closed, it is not incumbent upon such party to show, in addition to this, that the conduct complained of operated to his injury.—JACKSON V. ROANE, Ga., 16 S. E. Rep. 650.

9. ARBITRATION—Transmitting Award.—Pub. St. ch. 188, § 8, relating to arbitrations, provides that "the award shall be delivered by one of the arbitrators to the court designated in the agreement, or shall be inclosed and sealed by the arbitrators and transmitted to the court, and shall remain sealed until opened by the clerk:" Held, that an award inclosed in a sealed envelope, and sent by mail, addressed to "Joseph A. Willard, Esq., Clerk Superior Court, Boston," but without any writing on it declaring its contents, was, when received by him, transmitted to the court, within the statute.—MORRELL V. OLD COLONY R. CO., Mass., 32 N. E. Rep. 1030.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where an assignment for the benefit of creditors is set aside because of fraud on the part of the assignor, the assignee is not entitled to his commissions.—SLINGLUFF V. SMITH, Md., 25 Atl. Rep. 674.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS—Attorney.—An attorney who is assignee for the benefit of creditors cannot charge for professional services rendered to himself as trustee or to the trust estate, even though the deed of assignment provides for the allowance of reasonable attorneys' fees out of the trust funds before distribution thereof; his only legal claim being the statutory commission allowed to him as assignee.—KENTUCKY NAT. BANK V. STONE, Ky., 20 S. W. Rep. 1040.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS—Lunatic.—A deed in trust for the benefit of creditors, made by a lunatic, is only voidable, and not void.—RILEY V. CARTER, Md., 25 Atl. Rep. 667.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS—Parties.—Code Proc. § 134, declares that "every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law," and *Id.* § 147

declares that no action shall abate by the transfer of any interest therein, but the court may allow the action to be continued by or against the successor in interest: Held, that an assignment for the benefit of creditors does not prevent the assignor from prosecuting in his own name an action previously begun by him, where the assignee makes no application to be made a party to the action.—BOX v. KELSE, Wash., 31 Pac. Rep. 973.

14. ATTACHMENT—Damages.—Where plaintiff, in an action for wrongful attachment, did not employ an attorney to defend the attachment suit, but allowed a judgment to be entered by default, he cannot recover, as damages, the amount paid to an attorney for making a motion for a new trial of such action.—TRAMMELL v. RAMAGE, Ala., 11 South. Rep. 916.

15. ATTACHMENT—Distribution of Proceeds.—Attaching and judgment creditors at the same term of court are entitled to a *pro rata* distribution of the property attached or levied on by virtue of executions issued at that term, and it is the duty of the sheriff to retain the funds till the action of the court is had with reference to the distribution, which without the consent of all parties, cannot occur till 90 days from the issuance of the writs.—RAWLES v. PEOPLE, Colo., 31 Pac. Rep. 941.

16. ATTACHMENT AGAINST NON-RESIDENT.—Where an attachment was issued against a non-resident, and after due notice by publication a judgment by default was given, defendant cannot complain on appeal that the amount named in the affidavit for attachment was less than that claimed in the complaint subsequently filed and for which judgment was given.—DECATUR & N. IMP. CO. v. CRASS, Ala., 12 South. Rep. 41.

17. ATTORNEYS' FEES—Lien.—Where an attorney prosecuting certain actions employed plaintiff to assist him under an agreement by which plaintiff was to receive compensation only in case of recovery, such agreement gives plaintiff an equitable lien on the amount received for such services.—HARWOOD v. LA GRANGE, N. Y., 32 N. E. Rep. 1000.

18. BOUNDARIES—Course and Distance.—The fact that land granted by the State had been simply platted on paper without an actual survey being made, and that the second corner called for was 300 varas further distant from the beginning corner than the distance specified in the patent, will not warrant an instruction that the jury should locate the grant by course and distance alone, when there are other calls in the patent for well-established monuments which would also have to be disregarded, as the rule is that all the calls of the patent should be looked to in determining what was the particular land intended to be conveyed.—ROBERTS v. HELMS, Tex., 20 S. W. Rep. 1004.

19. CARRIERS—Interstate Commerce Act.—The long and short haul clause of the interstate commerce act (section 4) does not apply to a case where the short haul rate is the combined local rates of two connecting lines, and the lower long haul rate is a joint rate made by the two lines acting together; and an indictment alleging such rates is bad.—UNITED STATES v. MELLEN, U. S. D. C. (Kan.), 53 Fed. Rep. 229.

20. CARRIERS—Limiting Liability.—A common carrier may stipulate, in a contract of shipment to a point beyond its line, that it shall be released from liability after the chattels shipped have left its line, and such stipulation will result to the benefit of a connecting carrier over whose line the chattels pass, exempting such connecting carrier from liability for loss except that which occurs on his own road.—INTERNATIONAL & G. N. R. CO. v. MAHULA, Tex., 20 S. W. Rep. 1002.

21. CARRIERS—Passenger—Contributory Negligence.—In an action against a railroad company for damages for personal injuries caused by contracting a cold while traveling, the failure of plaintiff, who was inexperienced in traveling, to call attention of the company's employees to the cold condition of the car, before taking sick, would not preclude recovery, but its effect as bearing upon the question of contributory negligence should be left to the jury, to be determined from all the circumstances in the case.—HASTINGS v. NORTHERN PAC. R. CO., U. S. C. C. Wash., 53 Fed. Rep. 224.

22. CARRIERS — Passengers — Damages.—Plaintiff, a passenger on defendant's train, alighted at a flag station, and, while attempting to get on again, was run over, the injuries he sustained permanently disabling him from pursuing his usual occupation: Held, that evidence of what plaintiff's occupation was, the amount of his annual earnings at that occupation, his age, and a calculation according to the mortality tables of how much longer he would probably live, was properly admitted, in order to enable the jury to estimate the damages sought to be recovered for the injury.—GALVESTON, H. & S. A. RY. CO. v. COOPER, Tex., 20 S. W. Rep. 990.

23. CARRIERS — Passenger — Negligence.—Where a woman in an enfeebled condition has not time to alight from a railroad train during the stop at her place of destination, and leaps therefrom after the train again gets in motion, without any warning to the conductor or other employee, she is not entitled to recover damages against the company for injuries caused thereby.—LOUISVILLE & N. R. CO. v. LEE, Ala., 12 South. Rep. 48.

24. CARRIERS—Passenger — Negligence — Bridge.—A street railroad which lays its tracks across a bridge constructed and maintained by the State, and constituting a part of the highway on which the railroad line runs, does not adopt the bridge as one of its appliances, so as to become liable for an injury to passengers caused by defects thereon to the same extent as if the bridge had been built by the company.—BIRMINGHAM v. ROCHESTER CITY & B. R. CO., N. Y., 32 N. E. Rep. 995.

25. CARRIERS OF PASSENGERS — Negligence.—In an action against a street car company for injury to a passenger, the evidence showed that plaintiff, an elderly lady, entered the car by the front platform, and that before she reached her seat the car started, and she fell down: Held, that whether plaintiff's conduct in entering the car from the front platform, and going towards a seat with her back to the horses, without steadying herself by the use of the straps placed in the car for that purpose, constituted contributory negligence, was for the jury.—HOLMES v. ALLEGHENY TRACTION CO., Penn., 25 Atl. Rep. 640.

26. CERTIORARI — Jurisdiction.—Where, on *certiorari*, the record does not show the board to have found that the facts existed upon which their jurisdiction depended, oral evidence is admissible to show such jurisdiction.—LONSDALE CO. v. BOARD OF LICENSE COM'RS OF TOWN OF CUMBERLAND, R. I., 25 Atl. Rep. 655.

27. CHATTEL MORTGAGE—Description.—A mortgage transferring certain "dark-colored horse mules" on the mortgagor's place, in L county, does not include a brown mule recently acquired by the mortgagor, but of which he had not taken actual possession, and which had never been on his place.—BAER v. WHITTAKER, Ark., 20 S. W. Rep. 1087.

28. CHATTEL MORTGAGE—Foreclosure.—In an action by a chattel mortgagor against the mortgagees to redeem the property, for an account, and for an injunction prohibiting a foreclosure, it appeared that there had been a foreclosure and sale as to part of the property, and defendants were about to foreclose for the balance: Held, that the partial foreclosure and sale did not defeat the lien of the mortgage.—HOPKINS v. MCCRILLIS, Mass., 32 N. E. Rep. 1026.

29. CHINESE—Indictment.—The act of May 5, 1892, providing that any Chinese person "convicted and adjudged" to be not lawfully entitled to remain in the United States shall be imprisoned at hard labor for not more than one year, and thereafter removed from the country, cannot be made the basis of an indictment. The statute is political, and not criminal, in its na-

ture; the proceeding is summary in character, and the imprisonment is not for the purpose of punishment, but for detention until the removal is effected in the manner provided by the act.—UNITED STATES v. HING QUONG CHOW, U. S. C. C. (La.), 53 Fed. Rep. 233.

30. CONSTITUTIONAL LAW — Civil Rights — Separate Railway Coaches.—Act 111 of the legislature of 1890, regulating accommodations of the races on railways, does not violate the thirteenth amendment of the United States constitution, because such accommodation involve no badge of slavery or involuntary servitude, which is the sole subject of that amendment.—EX PARTE PLESSY, La., 11 South. Rep. 948.

31. CONSTITUTIONAL LAW—Railroad Commissions.—A State statute empowering railroad commissioners to establish just and reasonable rates, and making the order of the commissioners fixing rates conclusive evidence of their reasonableness, would be repugnant to the constitution of the United States, as depriving the railroads of due process of law; for the reasonableness of any rates fixed by the commission is a question for judical determination, according to the methods of investigation appertaining to courts of justice.—RICHMOND & D. R. CO. v. TRAMMEL, U. S. C. C. (Ga.), 53 Fed. Rep. 197.

32. CONSTITUTIONAL LAW—Trust Company Acting as Surety.—The provision of the act incorporating the Fidelity & Deposit Company of Maryland, authorizing the company to become "sole surety" on the bond of a trustee for the benifit of creditors where by Code, art. 16, § 203, "sureties" are required on such bond, is not in conflict with Const. art. 3, § 33, providing that "the general assembly shall pass no special law for any cause for which provision had been made by an existing general law." —GANS v. CARTER, Md., 25 Atl. Rep. 663.

33. CONSTITUTIONAL LAW — Taxing Drummers.—A State statute imposing a license tax on drummers and others selling by sample, within a certain taxing district, is a regulation of interstate commerce, and unconstitutional as applied to citizens of other States.—RICHARDSON v. STATE, Miss., 11 South. Rep. 934.

34. CONTEMPT—Receiver.—The president of a bank, upon whom, as such president, summons is served in an action against the bank is not personally bound by the judgment rendered therein; and it is not contempt of court for him, at the time a receiver is appointed for the bank, to refuse to deliver to said receiver property of the insolvent bank held as collateral security by another bank, of which he is president.—STATE v. BALL, Wash., 31 Pac. Rep. 975.

35. CONTRACT—Liquidated Damages.—By a clause in a contract for the building of a street railway in plaintiff town, defendants, in default of its construction within a certain time, agreed "to forfeit and pay" the sum of $500 to plaintiff: Held, an agreement to pay liquidated damages.—NILSON v. TOWN OF JONESBORO, Ark., 20 S. W. Rep. 1093.

36. CONTRACTS—Offer of Sale.—The acceptance by a manufacturer of an order to deliver to plaintiff all the goods of a specified class, at specified prices, that plaintiff may need during the season, is merely an offer by the manufacturer to furnish the goods, which he has a right to withdraw at any time before it is acted on, as there is no mutuality in the contract; but after he has filled an order at the prices specified, and has thus had the benefit of a sale, the entire contract becomes valid and binding, and he cannot thereafter decline to fill further orders.—COOPER v. LANSING WHEEL CO., Mich., 54 N. W. Rep. 39.

37. CONTRACT — Parol Evidence.—A land company made to a manufacturing company the following proposition, which was accepted: "The North Augusta Land Company will donate to your company 3 acres of land, to be selected by it, on its property opposite to the City of Augusta, and will promptly build or cause to be built to the land so donated, a side track, and when your factory is completed, and machinery in successful operation, will buy from you $2,500 worth of your treasury stock at its par value, when your factory is in successful operation, as aforesaid. The above is conditioned upon your beginning work at once:" Held, that the completion of the factory was not a condition precedent to the building of the side track, and that parol evidence to that effect should not be admitted.—SOUTHERN PINE FIBRE CO. v. NORTH AUGUSTA LAND CO., U. S. C. C. (S. Car.), 53 Fed. Rep. 318.

38. CORPORATIONS—Dividend.—Where the fact that a dividend has been voted by directors is not made public, or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded.—FORD v. EASTHAMPTON RUBBER THREAD CO., Mass., 32 N. E. Rep. 1036.

39. CORPORATIONS—Foreign— Service of Process.—Service of process upon attorney of a foreign corporation is not sufficient, under Code Civil Proc. § 432, providing for such service on the cashier, a director, or a managing agent of the corporation within the State, since the attorney is not such an agent, within the meaning of the statute.—TAYLOR v. GRANITE STATE PROVIDENT ASS'N, N. Y., 32 N. E. Rep. 992.

40. CORPORATIONS — Stockholders — Subscription.—Const. art. 12, § 6, provides that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void:" Held, that stock issued and disposed of for a valid consideration, though for less than its face value, is not fictitious within the meaning of the statute, as to the amount issued in excess of the price paid.—MATHIS v. PRIDHAM, Tex., 20 S. W. Rep. 1015.

41. CORPORATIONS — Stock Subscriptions.—One who subscribes to corporate stock for his wife, in the wife's name, is not liable on the subscription, because a married woman cannot make such a subscription; but if the subscription is for himself, although in the wife's name, it is otherwise.—SHIELDS v. CASEY, Penn., 25 Atl. Rep. 619.

42. COUNTIES—Defective Bridges.—Where a county board negligently fails to keep a public bridge in suitable repair so as to be in a safe condition for travel, and damages have been occasioned by reason thereof, under the act of the legislature of 1889 the county is liable therefor to the person sustaining the damages, unless he has been guilty of contributory negligence. — HOLLINGSWORTH v. SAUNDERS COUNTY, Neb., 54 N. W. Rep. 79.

43. COUNTY WARRANTS — Payment.—Where county warrants, received in payment of the debt due from defendants to plaintiff county, are afterwards found to be forgeries, but notice thereof is not given to defendants until nearly three years later, and it does not appear that defendants' right of redress against the person from whom they purchased the warrants has been preserved unimpaired, such delay will preclude a recovery of the debt by the county.—STATE v. ABRAMSON, Ark., 20 S. W. Rep. 1083.

44. COURTS—Disqualification of Judge.—A judge who is disqualified, under Code Civil Proc. § 170, from sitting or acting as such in an action in which he has been attorney, may order and superintend the drawing of the panel of jurors for the term of court by which such action is to be tried, since this is not sitting in the action within the meaning of the statute.—PEOPLE v. AH LEE DOON, Cal., 31 Pac. Rep. 933.

45. COURTS—Disqualification of Judge.—Under Const. art. 5, § 11, and Code Crim. Proc. art. 569, providing that no judge shall sit in any case where he shall have been counsel, where a judge has acted as counsel at a prior hearing in the case, the judgment is void, even though such judge presides with the consent of both parties.—ABRAM v. STATE, Tex., 20 S. W. Rep. 987.

46. CRIMINAL EVIDENCE—Murder.—On indictment of one for a particular murder, said to have resulted from

the hostile relations of certain clans, it is not competent to show other murders committed by such clans, nor the fact that armed men were employed to protect the county seat against invasion therefrom.—SPURLOCK v. COMMONWEALTH, Ky., 20 S. W. Rep. 1095.

47. CRIMINAL LAW—Appeal.—Where a defendant convicted of murder duly filed his bill of exceptions, in skeleton form, together with a copy of the evidence, but was unable to perfect his appeal because the clerk, in violation of his duties, refused to make a transcript, the judgment will be reversed, on the cause being subsequently bought up on writ of error, where it is then discovered that the copy of the evidence has been lost or stolen without fault on the part of defendant or his attorney.—STATE v. MCCARVER, Mo., 20 S. W. Rep. 1058.

48. CRIMINAL LAW—Continuance.—The discretion of the trial court in refusing a continuance on the ground of the absence of one of defendant's witnesses will not be disturbed when it appears that defendant, after he was released on bail, had about eight months in which to prepare for trial, that the venue of the case had been changed and one continuance granted on account of defendant, and that there were other persons who knew something of the circumstances immediately preceding the killing about which the absent witness was to testify, and no effort was made to secure their testimony.—PRICE v. STATE, Ark., 20 S. W. Rep. 1092.

49. CRIMINAL LAW — Extortion—Constable.—The act of March 31, 1860, § 12, defining as extortion certain acts done by "any justice, clerk, prothonotary, sheriff, coroner, constable, or other officer of this commonwealth," does not apply to a deputy constable of a township, appointed by an order of court, which declares that he shall exercise and possess all the powers of policemen of the cities of the commonwealth, and shall be wholly paid by private subscriptions, and the county or the township shall in no way be responsible for his compensation.—COMMONWEALTH v. SAULSBURY, Pa., 25 Atl. Rep. 610.

50. CRIMINAL LAW—Homicide.—Where, in a trial for murder, the evidence shows that defendant fired the fatal shot while making an assault, with two companions, on a dwelling occupied by the deceased, it is not error for the State to prove that during the affray one of defendant's companions, using defendant's pistol, shot at and wounded one H, such shooting being competent as a circumstance attending the homicide.—PEOPLE v. PARKER, N. Y., 32 N. E. Rep. 1013.

51. CRIMINAL LAW—Homicide—Insult to Female Relative.—Pen. Code, arts. 597, 598, provides that insulting words or conduct by deceased towards a female relative of the slayer is an adequate cause for a homicide, if it occurs at the first meeting of the parties after the slayer is informed of the insult; and article 601 provides that any female under the permanent or temporary protection of the slayer at the time of the killing shall also be included within the meaning of the term "relation:" Held, that the difference between the cases of an actual relation and the statutory relation of protection is that, while in both cases the insult must be given, during the existence of the relationship, the killing must occur at the first meeting, in the case of actual relationship, and, in the statutory relationship, it must occur while the female is under the protection of the slayer; for, if she leaves him before the first meeting with the one insulting her occurs, the right to act is gone.—EXPARTE JONES, Tex., 20 S. W. Rep. 983.

52. CRIMINAL LAW — Homicide — Justification. — The killing of one who, voluntarily, and without apparent excuse, leaves a place of safety, and with drawn pistol goes to where certain persons—several on each side—are fighting, and, taking the side of one, commences firing indiscriminately, is justified, though all the parties originally engaged were in the wrong, if such killing was necessary, or seemed to be necessary, to ward off danger threatened either by deceased or those with whom he was associated.—NANTZ v. COMMONWEALTH, Ky., 20 S. W. Rep. 1097.

53. CRIMINAL LAW — Homicide — Self-defense. — The danger need not be real in order to justify the taking of human life, but the apparent danger must be such as to create in the mind of a reasonable man a just apprehension of imminent danger to life or limb, but these mitigating circumstances must be shown by the accused to the satisfaction of the jury. — KEITH v. STATE, Ala., 11 South. Rep. 914.

54. CRIMINAL LAW—Homicide — Self defense.—It is not true, as a general proposition, that "one who is assaulted by another with a dangerous weapon is justified in taking the life of the person so assaulting him;" nor that "if A assaults B with a dangerous weapon, and B believes his live in danger, and that he is in danger of great bodily harm, he is justified in shooting at A, and that if, in so doing, he kills C, the killing is justifiable or excusable;" nor that "when a person is assaulted by another with a dangerous weapon, and the person assaulted is in danger, or if he believes his life is in danger, and has reason to believe, or that he will suffer great bodily harm, he is not bound to retreat, but may kill his assailant."—STATE v. WEST, La., 12 South. Rep. 7.

55. CRIMINAL LAW—Robbery. — On a prosecution for robbery, it appeared that defendant and a companion, heavily armed, went to the store of the prosecuting witness, and defendant ordered him to put up various parcels of merchandise, with a threat of assault if he disobeyed. After his order had been obeyed, defendant and his companion left the store, and the latter afterwards returned with another confederate, and carried away the goods ordered by defendant: Held, that defendant's absence from the store at the very time the goods were carried away does not relieve him from the crime of robbery, since it is sufficient if defendant's threat was the operative cause of the delivery to his co-conspirators.—ASHWORTH v. STATE, Tex., 20 S. W. Rep. 982.

56. CRIMINAL LAW—Theft — Instructions. —On a trial for burglary, and theft of property belonging to F, a charge that if defendant did break and enter a house occupied by F, and did then and there, without the consent of F, steal and carry away from the possession of F property of the description set out in the indictment, and said property was taken with fraudulent intent to deprive F of the value of the property so taken, defendant is guilty, is not subject to the objection that under it defendant might be convicted of the theft of property other than that of F. — CONNERS v. STATE, Tex., 20 S. W. Rep. 981.

57. CRIMINAL PRACTICE — Assault and Battery.—It is not necessary, in an information or indictment, to use the precise words of the statute. It is sufficient if the words used are identical in meaning with those used in the statute.—HODGKINS v. STATE, Neb., 54 N. W. Rep. 86.

58. CRIMINAL TRIAL—Exclusion of Witnesses. — Code Crim. Proc. art. 662, providing that "at the request of either party the witnesses on both sides may be sworn and placed in the custody of an officer, and removed out of the court room," should not be enforced as to attorneys engaged in the particular case on trial.—BOATMEYER v. STATE, Tex., 20 S. W. Rep. 1102.

59. CRIMINAL TRIAL—Verdict.—As it has always been the Maryland practice, in criminal cases, for the jury, after they have returned their verdict and it has been recorded, to be called on by the clerk "to hearken to their verdict as the court hath recorded it," a judgment entered upon a verdict of a jury discharged and separated without being so called on by the clerk will be reversed.—GIVENS v. STATE, Md., 25 Atl. Rep. 689.

60. DEATH BY WRONGFUL ACT — Municipal Corporation.—Municipal corporations are not within Rev. St. art. 2899, subd. 2, allowing actual damages for the death of "any person" through the wrongful act, neglect, or default of "another;" said section being confined to natural persons only.—RITZ v. CITY OF AUSTIN, Tex., 20 S. W. Rep. 1029.

61. DEDICATION AS "COMMON."—In platting land, the proprietors designated a strip which was "to be and remain a common forever." In an action against the city to recover the strip because of misuser, the evidence showed that the only permanent structure thereon was a transfer railway track authorized by defendant, that the ground was used by the public for the exchange of merchandise, and that all obstructions thereon could be removed within 10 days: Held, that defendant has not appropriated the land to purposes other than those implied by the term "common."—GOODE V. CITY OF ST. LOUIS, Mo., 20 S. W. Rep. 1049.

62. DEED—Cancellation — Fraud.—B obtained a conveyance of property through fraud, and thereafter conveyed to R, who, the facts tended to show, was cognizant of the fraud, but who denied all knowlege thereof. On the same day, R reconveyed to his brother, who was absent, and knew nothing about the property, and did not appear as a witness in the case. There was no consideration, delivery, or acceptance of the deed by the brother: Held, that a decree canceling all the deeds would not be disturbed. — REDDIN V. DUNN, Colo., 31 Pac. Rep. 948.

63. DEED — Construction. — An instrument executed by T and A provided that, in consideration of the right of way "granted" by T to A for the purpose of building a railroad track, A agreed to pay T $200 per year for five years; the first payment to be made on or before the day on which the first train passes over said right of way: Held, that the instrument was not a temporary lease of the right of way for the period of five years, but was an absolute conveyance of such right of way. —DES MOINES COUNTY AGRICULTURAL SOC. V. TUBBESING, Ia., 54 N. W. Rep. 68.

64. DEED—Construction. —In an action to determine the title to land, where the pleadings show that the language of the instrument conveying the land is ambiguous, the facts and circumstances of the execution of the instrument can be shown, to explain its purpose and meaning, in order to find out the intention of the makers thereof. — MCHUGH V. GALLAGHER, Tex., 20 S. W. Rep. 1115.

65. DEEDS—Conveyance of Coal. — Where the owner of land conveys the coal under the surface, he retains the title to everything beneath the coal, and has the right of access to it, though the deed does not expressly reserve such right. — CHARTIERS BLOCK COAL CO. V. MELLON, Penn., 25 Atl. Rep. 597.

66. DEED — Delivery. — Defendant and his wife executed a deed claimed by certain creditors to be a conveyance of all his real estate to his children, jointly. After its execution it was given to a son-in-law to be taken to the county seat, and submitted to S for his advice as to the legality of the conveyance, and if approved by him it was to be filed for record. S advised against the conveyance, and the son-in-law carried it back, when it was destroyed, at the direction of defendant: Held, that there was no delivery of the deed. —FARMERS' & TRADERS' BANK OF BONAPARTE V. HANEY, Ia., 54 N. W. Rep. 61.

67. DEED—Description.—Where an uncertainty as to the identity of land conveyed can be explained by extrinsic proofs, the conveyance is not void for want of description. — MCWHIRTER V. ALLEN, Tex., 20 S. W. Rep. 1007.

68. DETINUE—Evidence.—Where, in detinue, defendant, in seeking to show that he was not in possession of the property at the bringing of the suit, offers in evidence his cash book, containing an original entry by his cashier in the regular course of business, of a sale of the property on a day prior to the institution of the suit, and the testimony of the cashier that the entry was so made by him, the exclusion of this entry and testimony is reversible error. — BOLLING V. FANNIN, Ala., 12 South. Rep. 59.

69. DOWER — Personalty. — A widow cannot claim dower in a store house and lot belonging to the partnership of which her husband was a member, for such property is a part of the social assets of the firm, and is regarded as personalty, in which the widow could participate only as a distributee. — DEERING & CO. V. KERFOOT'S EX'R, Va., 16 S. E. Rep. 671.

70. EJECTMENT — Evidence. — A railroad company which has condemned land for railroad purposes has a sufficient title to sustain an action of ejectment.—PITTSBURG, FT. W. & C. RY. CO. V. PEET, Penn., 25 Atl. Rep. 612.

71. EMINENT DOMAIN — Compensation.—In an action for damages to land used for farming purposes, resulting from the construction over it of a pipe line, it is competent, in estimating the injury to the property as a whole, to show that part of the land is ripe for building improvements. — WILSON V. EQUITABLE GAS CO., Penn., 25 Atl. Rep. 635.

72. EMINENT DOMAIN — Compensation — Damage. — Where rented property is injured by a public improvement it is proper, on an inquiry of the damages, to inquire to what extent, if any, the improvement will affect the rental value. This is merely an element of damage for the jury to consider, keeping in view the fact that the measure of damages is the difference between the value of the property immediately before and immediately after the construction of the same, and disregarding public benefits.—CITY OF OMAHA V. HANSEN, Neb., 54 N. W. Rep. 83.

73. EQUITY—Cancellation of Mortgage.—In an action to cancel a mortgage, and enjoin a foreclosure of same, the bill alleged that the complainant received $1,000 of defendant corporation, which sum was still unpaid, and gave his note for $1,200, secured by the mortgage; that, if the transaction is governed by the laws of Alabama, it was void, because defendant, being a foreign corporation, did not have a known place of business in the State, as required by the constitution, and if the transaction is governed by the laws of New York, where the papers were executed, it was void, for usury; and that complainant is not indebted to defendant in any sum, but complainant offered, if he was mistaken in this, to pay defendant whatever sum the court adjudged to be due: Held, that the offer to pay, though not unequivocal, was sufficient to bring the case under the rule that he who asks equity must do equity.—NEW ENGLAND MORTG. SEC. CO. V. POWELL, Ala., 12 South. Rep. 55.

74. EQUITY — Set-off. — In an action to foreclose a chattel mortgage, it appeared that defendant had sold a bill of goods to plaintiff, and charged the same to him: Held that, as there was no agreement that the claims for the goods should be applied on the mortgage debt, it was not available as a defense unless set up by a cross bill.—COTTON V. SCOTT, Ala., 12 South. Rep. 65.

75. EVIDENCE. — The general rule respecting the necessity of producing the record to show the acts of a court declared, and some of its limitations as to admitting the introduction of oral evidence concerning records stated.—STATE V. MAHONEY, Mo., 20 S. W. Rep. 1064.

76. EXECUTION — Exemptions. — A person who contracts to furnish all help, and make and burn brick for a certain price per 1,000, and also agrees to keep the machinery furnished by the other party in good repair, to supply oil for the same, and feed and care for the team furnished by the other party, is not entitled to the benefits of section 531 of the Code, which declares that "nothing in this chapter shall be so construed as to exempt any property in this State from execution or attachment for clerks', laborers', or mechanics' wages," etc.—HENDERSON V. NOTT, Neb., 54 N. W. Rep. 87.

77. EXECUTION — Exemptions — Pension Money. — Where defendant receives from the United States a pension certificate, which he presents to his wife, and with the proceeds she purchases land, and takes the title in her own name, the land so purchased cannot be subjected to the payment of a judgment recovered against defendant before the purchase, under Rev. St. U. S. § 4747.—MARQUARDT V. MASON, Ia., 54 N. W. Rep. 72.

78. EXECUTION—Sheriff's Deed. — Where land is sold under execution in an attachment suit, the sheriff's deed takes effect as of the date of the levy of the attachment, and a conveyance by the attachment debtor after the attachment was levied, and before judgment, vests no title in his grantee.—ROBINSON v. THORNTON, Cal., 31 Pac. Rep. 936.

79. EXECUTION SALE—Attachment.—Where personalty bought by an execution creditor at sheriff's sale, but left in possession of the debtor, a married woman, is afterwards attached by another creditor as the property of the husband, and a contest arises as to whether the husband or wife was in possession, and to which of them the property had belonged, a lease to the wife of the premises in which the property was situated is competent to show possession in her.—HUEBLER v. SMITH, Conn., 25 Atl. Rep. 659.

80. FALSE IMPRISONMENT.—One cannot maintain an action for false imprisonment where he is arrested by a proper officer, under a warrant lawful on its face, and issued by proper authority.—LEIB v. SHELBY IRON CO., Ala., 12 South. Rep. 67.

81. FEDERAL COURTS—Appeal—Trials.—When a case is tried in a federal court otherwise than according to the strict course of the common law, the circuit court of appeals has no jurisdiction as to exceptions taken at the trial, or as to the effect of the facts found, except as given by Rev. St. §§ 649, 700, in cases where a jury is waived.—MERRILL v. FLOYD, U. S. C. C. of App., 53 Fed. Rep. 172.

82. FEDERAL COURTS—Circuit Court of Appeals.—Under rule 10 of the circuit court of appeals, which requires a party excepting to a charge to the jury "to state distinctly the several matters of law in such charge to which he excepts," and provides that those matters only "shall be inserted in the bill of exceptions and allowed," an exception to "the whole of said instruction, and to each and every part thereof," cannot be sustained, if any of the propositions of law contained in such charge are sound.—PRICE v. PANKHURST, U. S. C. C. of App., 53 Fed. Rep. 312.

83. FEDERAL COURTS — Jurisdiction—Creditors' Bill. —A creditors' bill may be maintained in a federal court upon a judgment procured in a different State from that in which the court sits.—MERCHANTS' NAT. BANK v. CHATTANOOGA CONSTRUCTION CO., U. S. C. C. (Tenn.), 53 Fed. Rep. 314.

84. FEDERAL COURTS — Foreclosure.—In a suit to foreclosure a mortgage given on realty in Nebraska, and executed by a resident of that State, it was error for the circuit court to allow attorneys' fees, as an item of costs, under a provision of the mortgage for such an allowance in case of foreclosure, since the Supreme Court of Nebraska had determined that such a provision in a mortgage was invalid. Bendey v. Townsend, 3 Sup. Ct. Rep. 482, 109 U. S. 665, and Dodge v. Tulleys, 12 Sup. Ct. Rep. 728, 144 U. S. 451, followed.—GRAY v. HAVEMEYER, U. S. C. C. of App., 53 Fed. Rep. 174.

85. FEDERAL COURTS — Jurisdiction—Circuit Court of Appeals.—By act March 3, 1891, the entire federal appelate jurisdiction is divided between the supreme court and the circuit court of appeals, by enumerating the classes of cases wherein the judgment of each court shall be final.—BADARACCO v. CERF, U. S. C. C. of App., 53 Fed. Rep. 169.

86. FRANCHISE — Turnpikes — Eminent Domain.—A grant of franchise to a turnpike company is subject to the future exercise of right of eminent domain.—COVINGTON & L. TURNPIKE ROAD CO. v. SANDFORD, Ky., 20 S. W. Rep. 1031.

87. FRAUDULENT CONVEYANCES.—A conveyance of a stock of goods in trust to sell the same and apply the proceeds to the payment of a particular debt, is not void on its face, merely because it provides that the surplus shall be paid over to the grantor even though the grantor is insolvent when it is executed, such provision being proper in a mortgage; and, where this is the only objection to an offer of the conveyance in evidence, it is error to exclude it.—PUCKETT v. RICHARDSON DRUG CO., Tex., 20 S. W. Rep. 1127.

88. FRAUDULENT CONVEYANCES.—Existing creditors may show that a sale of goods by their debtor was fraudulent in fact, notwithstanding he may have been solvent; and an instruction that, if at the time goods were sold by a debtor, he was solvent, and had sufficient property within the reach of his creditors, independently of the goods sold, to meet his liabilities, said sale did not have the effect to hinder and defraud his creditors, then they cannot question the terms and purpose of the sale, is misleading and erroneous. —SCHMICK v. NOELL, Tex., 20 S. W. Rep. 1135.

89. FRAUDULENT CONVEYANCES.—Where a merchant in failing circumstances conveys property to a portion of his creditors, the proceeds to be applied *pro rata*, in payment, on account, of antecedent debts, honestly due and not materially less than the value of the property conveyed, and no interest or benefit is reserved to the debtor, such conveyance will not be set aside or treated as a pledge or mortgage at the instance of the other creditors.—DAWSON v. FLASH, Ala., 12 South. Rep. 67.

90. FRAUDULENT CONVEYANCE—Contract of Hazard. —Two maiden ladies, the one an invalid, and the other 55 years old, helpless, dependent, and impoverished, assigned to their nephew G certain bonds, the value of which at the time was uncertain, but which afterwards proved to be valuable: he agreeing to support them during their lives. Thenceforth they both resided with G, the invalid continuing with him 23 years, till her death, and the other continuing thereafter. Both were satisfied with their contract, and never sought to annul it: Held, that it was a contract of hazard, and not void as against a prior creditor, whose claim was unknown to G, and who took no steps to enforce it till more than 20 years after the contract was made. —HISLE'S ADM'R v. RUDISILL, Va., 16 S. E. Rep. 672.

91. FRAUDULENT CONVEYANCE—Deed to Wife.—Where an insolvent judgment debtor sells and conveys land to a third person and the latter soon afterwards conveys part thereof to the debtor's wife, it will be presumed, in the absence of a showing to the contrary, that the husband's means furnished the consideration for the deed to the wife, and in such case the deed is fraudulent as to the judgment creditor without any showing of actual fraud.—PATTON v. BRAGG, Mo., 20 S. W. Rep. 1059.

92. FRAUDULENT CONVEYANCE—Evidence.—Where a failing debtor sells out his stock of goods to his employee, and the conveyance is attached by creditors as being fraudulent, the fullest latitude of proof of fraud should be allowed, and it is error to exclude evidence that the conveyance was not made in good faith, and in consideration of a valid debt.—COX v. TRENT, Tex., 20 S. W. Rep. 1118.

93. FRAUDULENT CONVEYANCES—Husband and Wife. —A conveyance of land to a wife for a consideration paid by her husband's creditors, is valid as against the husband's creditors if made to pay a debt owing by him to the wife of about the same amount as the value of the land, no matter what may have been the husband's motives in paying his wife in preference to other creditors.—KILGORE v. STONER, Ala., 12 South. Rep. 60.

94. FRAUDULENT CONVEYANCES—Trust Deed.—The fact that a trust deed given to secure creditors of a firm is withheld from record for two years after it is executed does not render it fraudulent and void as to other and subsequent creditors of the firm without notice, but is merely a circumstance to be considered on the question of fraud.—DAY v. GOODBAR, Miss., 12 South. Rep. 30.

95. GARNISHMENT—Notice.—The purpose of notices to the garnishee of conditional judgment, as required Code, § 2980, is to bring the party into court, and,

where the garnishee voluntarily appears, the objection that the notices were made returnable to the same instead of the next term of court is not material.—DECATUR C. & N. O. RY. CO. v. CRASS, Ala., 12 South. Rep. 43.

96. GARNISHMENT AGAINST MORTGAGEE.—Rev. St. 1878, § 2768, makes a garnishee liable to plaintiff to the amount of property in his possession, or under his control, belonging to defendant at the time of service of the summons, to the extent of defendant's interest therein, except such as is exempt from execution: Held, that where a garnishee had possession of goods as mortgagee of defendant, to secure advances made and to be made, he is liable to plaintiff for the value of the goods in excess of the amount advanced before the summons was served.—MCCOWN v. SMITH, Wis., 54 N. W. Rep. 31.

97. GARNISHMENT OF MUNICIPAL CORPORATION.—A board of school trustees or municipal corporation is not a "person" within the meaning of Code 1880, § 1832, providing that the chancery courts shall have jurisdiction of attachment suits against any non-resident absent, or absconding debtor, and "persons" in this State who have in their hands effects of, or are indebted to such debtor.—DOLLMAN v. MOORE, Miss., 12 South. Rep. 23.

98. GIFTS—Evidence.—A man without wife or children deeded his land in his last sickness to two nieces, who lived with him and took care of him. One niece was a widow with a child, and without property. The other was married. A brother and sister each had sufficient means for their support. The uncle was in full possession of his faculties, directed the preparation of the deeds, and had before stated his determination to make such a provision for the nieces: Held, a valid gift.—HAMILTON v. ARMSTRONG, Mo., 20 S. W. Rep. 1054.

99. GIFT—Rescission.—A gift by a mother, old and illiterate, of all her property to one of her sons, to the exclusion of her other children, will not be set aside at the suit of the mother, on the ground that the gift strips her of all her property, and leaves her dependent on the charity of others, where it affirmatively appears that the gift was executed by the mother while in possession of all her faculties, with a full understanding of all the facts and the effect of the transfer.—SOBERANES v. SOBERANES, Cal., 31 Pac. Rep. 910.

100. GUARANTY OF BUILDING CONTRACT.—When a person who has money in his hands belonging to a contractor makes a collateral guaranty of the performance of a building contract, the guarantor is entitled to notice of non-performance by the contractor within a reasonable time after the failure to perform. After months have elapsed, and the guarantor has settled with his principal, and paid over to him all sums of money in his hands, a notice is too late.—BONEBRAKE v. KING, Kan., 31 Pac. Rep. 1006.

101. GUARDIAN — Appointment.—The domicile of an adopted child is that of its adopting parent, and, when the parent was a resident in a county in Iowa at the time of his death, the court in that county has jurisdiction to appoint a guardian of its person, though at the time it is in another State, in the custody of a testamentary guardian appointed as authorized by the laws of that State, and of which the parent was formerly a resident.—IN RE JOHNSON, Iowa, 54 N. W. Rep. 69.

102. HIGHWAYS—Dedication.—Marking a street on the plat of a town or addition thereto, and selling lots with reference to such street dedicates the ground so marked to the use of the public as a street; and purchasers of lots have a right to have all streets marked on the plat by which they purchased kept open.—WOLFE v. TOWN OF SULLIVAN, Ind., 32 N. E. Rep. 1017.

103. HOMESTEAD — Abandonment.—A married man occupied certain land as his homestead until 1883, when he rented it, and did not occupy it afterwards. Seven years after, he bought two lots in an addition to the town of B on which he built a house, where he and his wife were living at the time of the trial: Held, that he had abandoned the land as a homestead.—RUSSEL v. NALL, Tex., 20 S. W. Rep. 1006.

104. HUSBAND AND WIFE — Agency.—A married woman who takes from her husband a deed of land previously leased by him, and so succeeds as lessor, is liable for work and materials furnished by the lessee at the request of the husband, acting as her agent, after her acquisition of the property, less any sums paid by the husband; but not, however, if the work and materials were furnished the husband on his own account, or under his express promise as principal.—LUEBE v. THORPE, Mich., 54 N. W. Rep. 41.

105. HUSBAND AND WIFE—Confession of Judgment.—A judgment confessed by a husband in favor of his wife, free from fraud, for a just debt due from him to her on account of her separate estate, will not be held void in a court of equity at the instance of his creditors, but will be a lien on his land. If fraudulent it is void as to them.—BENNETT v. BENNETT W. Va., 16 S. E. Rep. 638.

106. HUSBAND AND WIFE—Tenant in Common.—Where a husband and wife own a lot as tenants in common, the husband's interest in excess of his homestead exemption is liable for his debts.—KRIPPERDORF v. WOLFE, Miss., 12 South. Rep. 26.

107. INJUNCTION—Actions at Law.—The fact that a number of actions at law arise out of the same transaction, and depend upon the same matters of fact and law, none of the plaintiffs having the same interests, is not sufficient to warrant the enjoining said actions, and a joinder of the different parties interested in a single suit in chancery as defendants to prevent multiplicity of suits.—TRIBBETT v. ILLINOIS CENT. R. CO., Miss., 12 South. Rep. 32.

108. INJUNCTION—Associated Press—Right of Members.—Although the United Press Association obtains news directly through its own agents from various parts of the world, while the Associated Press of New York obtains news from its own agents only in New York, and from other parts of the world through contracts with other agencies, the former must be deemed to cover "a like territory" and to have been organized for "a like purpose" with the latter, within a by-law of the latter forbiding any of its members to receive and publish the dispatches of any association so circumstanced.—MATTHEWS v. ASSOCIATED PRESS OF STATE OF NEW YORK, N. Y., 32 N. E. Rep. 981.

109. INJUNCTION—Dissolution.—In a suit to enjoin enforcement of a judgment, an answer which fails to allege any damage resulting from the granting of the writ is sufficient to support a judgment on the injunction bond on dissolution of the injunction; it is not enough to allege that a certain sum remains unpaid on the judgment.—ROBERTSON v. SCHNEIDER, Tex., 20 S. W. Rep. 1129.

110. INSOLVENCY — "Failing Circumstances."—One who allows all his notes to go to protest for a considerable time without any provision for their payment or renewal, makes a mortgage to his daughter for a large sum, which, if not wholly fraudulent, is at least calculated to prefer her to other creditors, and who, although still carrying on business, is largely insolvent and knows that he will be unabe to continue, is "in failing circumstances," within Gen. St. § 501.—APPEAL OF MILLARD, Conn., 25 Atl. Rep. 658.

111. INSURANCE—Conditions of Policy.—Where an insurance company receives a premium, and issues a policy, with full knowledge that insured has concurrent insurance in another company, its consent thereto will be conclusively presumed.—EQUITABLE FIRE INS. CO. v. ALEXANDER, Miss., 12 South. Rep. 25.

112. INSURANCE—Notice of Cancellation.— A fire insurance policy provided that the company could terminate the insurance by giving "notice to the insured or his representative," and refunding a ratable

proporation of the premium: Held, that the brokers who obtained the insurance were not the insured's representatives to receive notice of cancellation.—WIGHT V. ROYAL INS. CO. U. S. C. C. (Penn.), 53 Fed. Rep. 340.

113. INSURANCE COMPANIES—State Superintendent.—The insurance act provides that the superintendent may examine the financial condition or management of any insurance company incorporated by or doing business in the State, and may compel the attendance of witnesses, production of papers, etc., in the prosecution of such examination: Held, that the act could have no extraterritoral force, and therefore the superintendent, being without power to act outside the State, could not draw on the fund for payment of his deputy's expenses in attending an insurance convention without the State, and in investigating the condition of a company in another State, though it was doing business within this State.—CARLILE V. HURD, Colo., 31 Pac. Rep. 952.

114. INSURANCE POLICY — Conditions—Attachment.—A writ of attachment is a "process" within the meaning of the condition of a fire insurance policy providing that, if any change takes place in the title or possession of the property by legal "process" then the policy shall be void.—CAREY V. GERMAN AMERICAN INS. CO. OF NEW YORK, Wis., 54 N. W. Rep. 18.

115. INTOXICATING LIQUORS—Alcohol.—Alcohol is not "vinous or spirituous liquors," within the meaning of Act Feb. 22, 1842, and the amendments thereto prior to 1886, relating to licensing the sale of vinous and spirituous liquors; and an indictment charging the sale of alcohol in violation of such statutes charges no offense.—LEMLY V. STATE, Miss., 12 South. Rep. 22.

116. INTOXICATING LIQUORS — Local Option.—Since the local option law prescribes no requisite for a petition for a local option election, it is sufficient if its expresses in an intelligible manner the desire of the petitioners that a local option election be held.—DILLARD V. STATE, Tex., 20 S. W. Rep. 1106.

117. JUDGMENT.—A judgment cannot be set aside on motion on the ground that the moving parties were not served with notice of the decision of the court overruling their demurrer to the complaint, and allowing them 20 days to answer, for under Code Civil Proc. § 473, a judgment can only be vacated on motion when its invalidity is apparent from an inspection of the judgment roll; and § 670, which provides what documents shall constitute the judgment roll, makes no mention of any paper proving service of the notice of decision overruling a demurrer.—JACKS V. BALDEZ, Cal., 31 Pac. Rep. 899.

118. JUDGMENT—Assignment.—Where a judgment debtor places in the hands of an attorney notes executed by the judgment creditor, purchased by the debtor for the purpose of setting them off against the judgment, knowledge by the attorney of the subsequent assignment of the judgment cannot be imputed to the judgment debtor, if the notes were placed in the attorney's hands for safe-keeping only, as in such a case the relationship of attorney and client would not exist between then.—SMITH V. WILSON, Tex., 20 S. W. Rep. 1119.

119. JUDGMENT—Enforcement in Equity.—Though a judgment has not lost its lien under the statute, a judgment creditor may, without execution, levy, or sale, maintain an equitable action in the district to foreclose the lien, as against land fraudulently claimed as a business homestead by the debtor, since such claim impedes the creditor in realizing on his judgment.—HULL V. NAUMBERG, Tex., 20 S. W. Rep. 1125.

120. JUDGMENT—Entry Nunc Pro Tunc.—On the 8th day of April, 1886, two justices presided at a trial at which a verdict was rendered, but no judgment thereon was entered. Subsequently, nearly two years afterwards, the same justices, without notice met and undertook to enter a judgment upon the verdict *nunc pro tunc:* Held, such entry *nunc pro tunc* was unauthorized and illegal, and was properly treated by the circuit court as nullity.—MCCLAIN V. DAVIS, W. Va., 16 S. E. Rep. 629.

121. JUDGMENT—Verdict.—Where the verdict in trespass to try title is not explicit as to the location of a ditputed boundary, the judgment entered thereon, which establishes the boundary, is incorrect.—MCCURDY V. Bullock, Tex., 20 S. W. Rep. 1110.

122. LANDLORD AND TENANT—Appeal.—An objection to a person's capacity to sue for and recover rent, on the ground that she is a married woman, cannot be raised on appeal, where it was not raised either by answer or demurrer on the trial.—SCHWARZE V. MAHONEY, Cal., 31 Pac. Rep. 908.

123. LANDLORD AND TENANT—Mining Lease—Damage.—Where the surface of land leased for mining purposes is injured because of sinks and depressions resulting from the lessee's negligence in operating the mine, the lessor's measure of damage is the depreciation in the value of the land.—MCGOWAN V. BAILEY, Penn., 25 Atl. Rep. 648.

124. LANDLORD AND TENANT — Possession. — In an action for the possession of land, where it appears that plaintiff, being in possession, leased the land to defendant, and placed him in possession, in the absence of fraud on the part of plaintiff in making the lease, it is no defense that the land is tide land, the title to which was in the United States when the lease was made.—CLANCY V. REIS, Wash., 31 Pac. Rep. 971.

125. LANDLORD AND TENANT—Waiver of Forfeiture.—A contract by which a tenant releases to the landlord a portion of the demised premises for a consideration to be credited on rent subsequently accruing, and which was executed after covenants of the lease had been broken, with full knowlege of that fact by the landlord, is an affirmance of the continuance of the lease at the time of the execution of such contract, and is a waiver of the forfeiture and of the right to re-enter for such breach.—BROOKS V. ROGERS, Ala., 12 South. Rep. 61.

126. LANDLORD'S LIEN — Leasehold. — A leasehold is not included in a tenant's "goods, furniture, and effects," so as to be subject to attachment for rent under Code, § 3069 *et seq.*—FIRST NAT. BANK OF BIRMINGHAM V. CONSOLIDATED ELECTRIC LIGHT CO., Ala., 12 South. Rep. 71.

127. LIFE INSURANCE—Condition. — An applicant for insurance in a mutual life company paid the admission fee, and took a receipt therefor, which expressly provided that the policy should not go into effect until the application had been accepted and approved. The warranty paragraph in the application provided that the policy should not be in force until the actual payment to and acceptance of the annual dues, and the actual delivery of the policy to the applicant. The application was not accepted, nor were the annual dues paid: Held, that no binding contract was created. — WEINFELD V. MUTUAL RESERVE FUND LIFE ASS'N, U. S. C. C. (Tenn.), 53 Fed. Rep. 208.

128. LIMITATIONS—Assumpsit on Judgment.—Though the general statute of limitations (How. St. § 8713) requires actions of assumpsit to be brought within six years after the cause of action accrues, assumpsit on a judgment may be brought at any time within 10 years after its entry, since section 8736 fixes that period for bringing "every action on a judgment or decree.—SNYDER V. HITCHCOCK, Mich., 54 N. W. Rep. 43.

129. LIS PENDENS — Notice.—Notice by *lis pendens* of a suit in equity begins with the service of the copy of the bill on the defendant, and not with the filing of the bill.—DUDD V. MCDONOUGH, Penn., 25 Atl. Rep. 608.

130. MANDAMUS — Exemption from Working Highways.—Under Elliott, Supp. § 1551, providing that a member of a legally organized fire company may be exempt from liability to work on highways, and, on application, "the township trustee shall execute to such preson a certificate thereof," *mandamus* will lie to compel such trustee to issue the certificate.—STATE V. PORTER, Ind., 32 N. E. Rep. 1021.

131. MANDAMUS—Supersedeas.—On an application for *mandamus* to show cause why a *supersedeas* granted by a judge of the circuit court should not be vacated, and a petition for rehearing dismissed, the court cannot consider the rulings on demurrer to the petition on the pleas and evidence in the case.—EX PARTE FARQUHAR, Ala., 11 South. Rep. 913.

132. MARRIED WOMAN — Mortgage.—Plaintiff, a *feme covert*, was the beneficial owner in fee simple of certain lands, the title to which was vested in her husband as trustee. Plaintiff and her husband joined in a deed conveying these lands to their son F for recited consideration of $20,000, but in fact for no consideration at all. F, by mortgage, conveyed the lands to defendant. The deed and mortgage were given to enable plaintiff's husband to borrow money, using the lands as security: Held that, as such deed divested plaintiff of all her interest in the land, the mortgage under it was valid.—SMYTHE V. FITZSIMMONS, Ala., 12 South. Rep. 48.

133. MASTER AND SERVANT — Assumption of Risk.—Where a brakeman is injured while at work on some flat cars that were being pushed ahead of an engine, he cannot recover if the risk was within the scope of his employment, and if he knew, when he entered the service of the road, that it was its custom to push flat cars in that way; but if he was ignorant of this custom when he entered the service of the road, or of facts which ought to have apprised him of it, and the custom was improper, and exposed him to unnecessary hazard when performing the duties assigned to him, he did not, in such case, assume the risk, and could recover if free from contributory negligence.—FORDYCE V. LOWMAN, Ark., 20 S. W. Rep. 1090.

134. MASTER AND SERVANT — Negligence.—A freight conductor injured by the derailment of a train cannot recover if the accident was occasioned by the negligent speed of the train, under his direction.—GORHAM V. KANSAS CITY & S. RY. CO., Mo., 20 S. W. Rep. 1060.

135. MASTER AND SERVANT—Servant's Torts.—Where defendant's baggage master, for his own amusement, by threats and menaces, caused a passenger who, through ignorance or carelessness, entered the express car, to jump from the car while in motion, defendant is not liable for the injury resulting therefrom, as such acts of the baggage master were not within the scope of his employment.—LOUISVILLE, N. O. & T. RY. CO. V. DOUGLASS, Miss., 11 South. Rep. 933.

136. MECHANIC'S LIEN.—Under Code Civil Proc. §§ 1183, 1184, 1201, providing that laborers shall have a lien for work done, and that the whole contract price, except that part due the contractor, shall be payable in money, without regard to any contract made between the landowner and contractor, the laborer may enforce a lien, though the contract price is less than $1,000, and payable in something other than money, when it remains unpaid at the time the lien is filed and the action begun.—SCHMIDT V. BUSCH, Cal., 31 Pac. Rep. 893.

137. MECHANICS' LIENS—Subcontract.—Pub. St. ch. 191, § 1, gives a lien for labor or materials furnished and used in the erection of a building by virtue of an agreement with or by consent of the owner: Held that, where one having a contract for a building sublet the plumbing contract, the materials and labor furnished under the latter contract were furnished "by consent of the owner," within the meaning of the statute.—MOORE V. ERICKSON, Mass., 32 N. E. Rep. 1031.

138. MECHANICS' LIENS — Payment. — Plaintiff, a material-man, took the note of the owner for whom the materials were furnished, the note including the amount for such materials, and also an old book account. The note fell due more than 30 days after the last item furnished, and within which a mechanic's lien might be claimed, and was not paid at maturity: Held, where the rights of innocent purchasers intervened, that the taking of the note was a complete settlement to date, and no lien could thereafter attach for any of the accounts included therein, even though plaintiff continued to furnish material subsequent to the execution of the note. — BLAKELEY V. MOSHIER, Mich., 54 N. W. Rep. 54.

139. MINES AND MINING — Tunnel Locations. — The location of a mining tunnel under Rev. St. § 2323, does not entitle the locator to the full length of a surface location (1,500 feet) on any vein or lode discovered on the line of the tunnel, but leaves the length of such location to be determined by the local laws or regulations; and in Colorado such length is fixed by Act 1861, § 5, (1st Sess. 166), at 250 feet each way from the tunnel. —RICO ASPEN CONSOLIDATED MIN. CO. V. ENTERPRISE MIN. CO., U. S. C. C. (Colo.), 53 Fed. Rep. 321.

140. MORTGAGE—Foreclosure.—The fact that a mortgagee, after bidding in the mortgaged property at foreclosure, fails to comply with her bid, and allows the property to be resold for a less sum, does not affect the lien of the mortgage, so as to justify a distribution, to subsequent lienholders, of the sum so realized.—SMITH V. WILSON, Penn., 25 Atl. Rep. 601.

141. MUNICIPAL CORPORATIONS—Constitutional Law. —Where a city incurs liabilities for materials furnished for the completion of a natural gas plant, after exhausting the proceeds of bonds issued under an enabling act, a supplementary statute (Act Ohio, April 7, 1892) validating and providing for the enforcement of such obligations is not unconstitutional, as imposing upon the city burdens without consent or consideration, or as conferring new corporate powers upon the city.—JARECKI MANUF'G CO. LIMITED V. CITY OF TOLEDO, U. S. C. C. (Ohio), 53 Fed. Rep. 329.

142. MUNICIPAL CORPORATION—Public Improvement. —Though the mayor of the city and county of San Francisco is vested with the veto power, he is not a part of the legislative department of the city government, within the meaning of the street law of 1883 (section 34), which declares the city council to be such department; and hence, under the provision of such street law which requires a resolution of intention to make a public improvement to be approved by the mayor "or" a three-fourths vote of the council a resolution passed by a three-fourths vote of the board of supervisors, which is the legislative department for the city, does not need the approval of the mayor.—MCDONALD V. DODGE, Cal., 31 Pac. Rep. 909.

143. MUNICIPAL IMPROVEMENTS — Assessments. — Under Act March 8, 1889, (Elliott, Supp. § 812), providing for the improvement of streets, the improvement may be ordered by the city council without the petition of two-thirds of the abutting owners; and therefore, in a bill to enjoin the assertion of a lien on abutting property for the cost of the improvement, it is not sufficient to allege that two-thirds of the adjoining owners did not petition for the improvement.—DE PUY V. CITY OF WABASH, Ind., 32 N. E. Rep. 1016.

144. MUNICIPAL IMPROVEMENT—Street Assessment.— In an action by the contractor to foreclose a street assessment for sewer building, the fact that the laborers worked 10 hours per day, where the contract provided that 8 hours should be a legal day's work for the employees, cannot be taken advantage of by defendants, it being no concern of theirs on what terms such laborers worked.—WILLIAMS V. SAVINGS & LOAN SOC., Cal., 31 Pac. Rep. 908.

145. NEGLIGENCE—Consideration.—In an action on a note, a plea that the note was executed in consideration of plaintiff's promise to deliver up to defendant a certain other note, and that he has failed to deliver it, without alleging that the promise was to deliver such note at any particular date, is bad.—WELBORNE V. NORWOOD, Tex., 20 S. W. Rep. 1129.

146. NEGLIGENCE—Excavation of Land.—In an action for damages by an adjacent owner for excavating too near to plaintiff's building, where the same subject-matter was set up in the defense as constituting a counterclaim, and also contributory negligence, and evidence was given, without objection, on contributory negligence, on which the finding was against defendant, it was not error to exclude evidence on the coun-

terclaim, as, the facts having failed to constitute contributory negligence, they could not constitute a counterclaim.—CURR v. HUNDLEY, Colo., 31 Pac. Rep. 939.

147. NEGLIGENCE — Highways.—Plaintiff, while driving on a dark night over a highway with which he was familiar, slackened the reins, and allowed his horses to go at will. On the lower side of the road there was an embankment one or two feet higher than the road, which protected vehicles from slipping down the hill. The horses went upon this embankment, and fell down the hill: Held, that the township was not liable, since the road was safe for ordinary travel, and plaintiff took the risk of letting the team find the road for itself.—MUELLER v. ROSS TP., Penn., 25 Atl. Rep. 604.

148. NEGLIGENCE — Independent Contractor.—Where the owner of a lot, the title to which is in another, has let a contract to an independent contractor to erect a building thereon, reserving no control over the contractor's servants, he is not liable for the acts of such servants in excavating for the building so negligently as to injure the building on the adjoining lot; and it makes no difference that he employed an agent to superintend the work, and see that the contract was complied with.—CRENSHAW v. ULLMAN, Mo., 20 S. W. Rep. 1077.

149. NEGLIGENCE — Receiver.—No action will lie against the receiver of a railroad company for personal injuries resulting in death, sustained through the negligence of the company's servants.—TEXAS & P. RY. CO. v. BLEDSOE, Tex., 20 S. W. Rep. 1135.

150. NEGOTIABLE INSTRUMENT—Demand of Payment.—A personal demand for payment, made on the maker of a note during business hours of the day such note is payable, is good, though not made at his residence or place of business, if the maker does not object to the place of demand.—PARKER v. KELLOGG, Mass., 32 N. E. Rep. 1038.

151. NUISANCE—Damages.—Defendant city used certain lands adjacent to plaintiff's home as a dumping ground for dead animals, and, the carcasses not being burned or buried, the stench arising therefrom was offensive to plaintiff and his family, and injurious to their health. Plaintiff complained to the city authorities of the nuisance several times, and no steps were taken by the city to abate it: Held, that defendant was liable for any injuries sustained by plaintiff through the maintenance of such nuisance.—CITY OF HILLSBORO v. IVEY, Tex., 20 S. W. Rep. 1012.

152. PARTNERSHIP—Allegation.—An averment in the body of a complaint that "plaintiffs [naming them], copartners in business, under the name and style of M & Co., for themselves, show that * * * * was indebted to them the said M & Co., in the sum," etc., is a sufficient allegation of plaintiffs' copar tnership. — MILLHISER v. HOLLEYMAN, S. Car., 16 S. E. Rep. 688.

153. PARTNERSHIP—Dissolution.—A partner sold his interest in a partnership of which he was a member to a new firm. Prior to the sale the said partnership had consented to the payment of a claim against it to the amount entered on the books. The new firm, purchasers and successors of the old firm, assumed in the act of transfer to them the liabilities of their vendor, the old firm. The new firm is bound for the payment of the claim assumed.—HAAS v. GODCHAUX, La., 11 South. Rep. 946.

154. PARTNERSHIP—Mortgages.—A mortgage of firm property was made by an insolvent firm while in possession of the property, free from any lien, and without fraudulent intent, to secure a firm note given in payment of individual debts of the partners: Held, that subsequent attaching creditors of the firm did not have such interest in the firm property at the time it was mortgaged as to give them a preference over that mortgage.—SMITH v. SMITH, Iowa, 54 N. W. Rep. 73.

155. PLEADING—Amendment after Appeal.—Where a demurrer to a complaint was overruled, and judgment entered, defendant electing to stand on the demurrer, and an appeal prayed, appeal bond filed, and transcript ordered, the court may thereafter at the same term vacate the judgment on application, and permit plaintiff to amend his complaint, where such amendment is not a matter of surprise or prejudice to defendant.—HIGGINS v. PEOPLE, Colo., 31 Pac. Rep. 951.

156. PRINCIPAL AND AGENT—Surety.—Where an agent signs the name of his principal as surety on a note, without being authorized in writing to do so, though it is done in the presence of and on the verbal authority of the principal, the principal is not liable; for Gen. St. ch. 22, § 20, provides that no person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal. — DICKSON'S ADM'R v. LUMAN, Ky., 20 S. W. Rep. 1038.

157. PRINCIPAL AND SURETY — Infant. — The fact that the principal in a bond given for the purchase price of property was at the time of executing the same an infant, and afterwards disaffirmed the contract, does not relieve the surety on the bond from liability for the deficiency after the property has been sold and the proceeds applied on the debt.—KYGER v. SIPE, Va., 16 S. E. Rep. 627.

158. PRINCIPAL AND SURETY—Landlord's Lien.—Where a landlord holds a lien for the debt due him, and through his negligence the security is lost, without the consent of the personal surety on the lease, the surety is discharged, to the extent of the security lost.—MINGUS v. DAUGHERTY, Ia., 54 N. W. Rep. 66.

159. PROCESS — Service — Enticing Defendant into Jurisdiction.—Where a person residing in one State is induced by a party in interest, by fraud or false pretense, to come into another, for the purpose of serving him with a summons, the jurisdiction is obtained by fraud, and the judgment is void. — TOOF v. FOLEY, Ia., 54 N. W. Rep. 59.

160. PROCESS — Service — Collateral Attack.—In Indiana, the return of the sheriff, showing that he has made service in them anner prescribed by the statute, is conclusive, as against a resident of the State, both as to facts in the personal knowledge of the officer and facts which he must ascertain from others; and such return cannot be impeached collaterally, for the purpose of quashing the service and return and ousting the court of jurisdiction, by showing that the facts stated in the return are untrue. — JOSEPH v. NEW ALBANY STEAM FORGE & ROLLING MILL CO., U. S. C. C. (Ind.), 53 Fed. Rep. 180.

161. PROCESS—Service by Publication. — The court is without jurisdiction where service of the summons is had by publication, unless an affidavit is filed, showing that a copy of the summons was deposited in the post-office, directed to defendant at his last known place of abode.—ROBERTS v. ROBERTS, Colo., 31 Pac. Rep. 941.

162. PUBLIC LANDS — Record. — A purchaser from an auditor of land sold to the State for taxes obtains no title thereto where such land had previously been sold by such auditor, though the deed of the prior purchaser was not filed for record in the office of the chancery clerk of the county in which the lands are located, before the second sale, since the statutes relating to the recording of instruments pertaining to land do not apply to conveyances by the State, they being simply permitted, but not required to be recorded.—PATTERSON v. LANGSTON, Miss., 12 South. Rep. 932.

163. PUBLIC LANDS—Patents.—A land patent from the government of the United States, issued with all the forms of law, may be shown to be void by any extrinsic evidence which is capable of showing a want of authority for the issue of the patent. — LAKIN v. DOLLY, U. S. C. C. (Cal.), 53 Fed. Rep. 333.

164. PUBLIC LANDS—Prior Homestead Entry.—An existing homestead entry of particular land at the time of the filing in the general land office of a map of the definite location of a land grant railroad, under the act of March 3, 1857, excepts such land from the operation of

the railroad grant, although the land is found to be within the limits of the grant.—WINONA & ST. P. LAND CO. v. EBILCISOR, Minn., 54 N. W. Rep. 91.

165. QUIETING TITLE—Judgment.—Where, in an action to remove a cloud from the title to land, the issue submitted to the jury is "whether or not defendant went into the actual and exclusive possession of the land claimed by him, and whether or not he has since remained in open and notorious possession thereof," a finding by the jury that defendant actually took and remained in open and notorious possession of the land is sufficiently responsive to the issue, even though there is no finding that the possession was "exclusive."—ROBINSON v. MOORE, Tex., 20 S. W. Rep. 994.

166. QUO WARRANTO — Municipal Judge.—An allegation, in an information in proceedings by *quo warranto* in behalf of the attorney general, that the respondent uses, enjoys, and performs the functions of a public office without warrant or authority of law, charges usurpation of said office, and is sufficient to require him to show by what right or authority he exercises or performs the functions thereof; and, as against the State he must show a complete and perfect right.—STATE v. PHILIPS, Fla., 11 South. Rep. 922.

167. RAILROAD BONDS — Trustees. — The trustees of railroad mortgage bondholders represent such bondholders in any litigation relating to the trust, and, where the purpose of the suit is substantially the same as a foreclosure of the mortgage, the fact that the trustee is a party defendant instead of plaintiff is immaterial, and the bondholders are bound by the decree, although they are not parties to the suit. — POLLITZ v. FARMERS' LOAN AND TRUST CO., U. S. C. C. (N. Y.), 53 Fed. Rep. 210.

168. RAILROAD COMPANY—Claims against Receivers.—Where, on an appeal by a railroad company from the amount of damages assessed against it for the condemnation of a right of way, judgment is had against the company, and from the fact that the company has passed into the hands of a receiver an execution on the judgment is enforced against plaintiffs, who were sureties on the appeal bond, a decree that the receiver allow plaintiffs out of the moneys arising from the sale of the railroad property the amounts paid by them as such sureties, is proper.—ROME & D. R. CO. v. SIBERT, Ala., 12 South. Rep. 69.

169. RAILROAD COMPANIES—Crossings—Negligence.—One coming upon a railway is bound to use ordinary care to observe train movements thereon. Failure to "look and listen" may amount, in some circumstances, to a want of such care. The standard by which action in that regard is to be measured is that degree of care which, in the opinion of the court, should characterize a persoa of ordinary prudence in the same situation.—EASLEY v. MISSOURI PAC. RY. CO., Mo., 20 S. W. Rep. 1073.

170. RAILROAD COMPANIES—Electric Railways—Negligence.—It is negligence for an electric street car company to run a car along a narrow and unlighted alley, on a dark night, so fast that it cannot be stopped within the distance covered by its own headlight.—GILMORE v. FEDERAL ST. & P. V. PASS. RY. CO., Penn., 25 Atl. Rep. 651.

171. RAILROAD COMPANIES — Killing Stock.—Prior to the passage of the act requiring railroad companies to fence their tracks, negligence is the basis of liability in an action against the company for killing live stock on the track, and it must be alleged in the declaration; but an allegation that the engine and cars of the defendant company were so negligently and carelessly operated by the agents and servants of the company that the engine struck an animal described in the declaration, by means whereof it died, is sufficient.—JACKSONVILLE, T. K. W. RY. CO. v. GARRISON, Fla., 11 South. Rep. 929.

172. RAILROAD COMPANIES—Killing Stock.—Under the act of 1887 (chapter 3740, Laws Fla.), the killing of live stock by a railway engine, cars, or train is *prima facie* evidence of negligence on the part of the company operating the engine or train; and where the testimony shows that live stock was killed by a train of cars on a railroad, and there is nothing in the evidence to relieve the killing from the statutory presumption that it was negligently done, it is sufficient to sustain a judgment against the company.—JACKSONVILLE, T. & K. W. RY. CO. v. GARRISON, Fla., 11 South. Rep. 926.

173. RAILROAD COMPANIES — Municipal Aid.—Laws Ohio 1880, p. 157, which authorizes a certain township to construct a few miles of railroad within its limits, intended to ultimately form part of a continuous line of road to be operated and equipped by private capital, violates Const. Ohio, art. 8, § 6, which prohibits the general assembly from authorizing any county, city, town, or township to become a stockholder in any private corporation, or to raise money for or loan its credit in and of such corporation; and bonds issued by a township for such a p rpose are void.—AETNA LIFE INS. CO. v. PLEASANT TP., U. S. C. C. (Ohio), 53 Fed. Rep. 214.

174. RAILROAD COMPANIES—Stock Killed.—In an action against a railroad company to recover for the killing of a mule by defendant, plaintiff testified that he had possession of the mule; that he had not paid for it, but that he considered the mule his; and that he did actually pay for the mule after it was killed: Held, that plaintiff had a special property in the mule, which empowered him to recover its full value.—ST. LOUIS, I. M. & S. RY. CO. v. TAYLOR, Ark., 20 S. W. Rep. 1083.

175. RAILROAD COMPANIES—Street Railways—Obstructions in Street.—In an action against a railway company for personal injuries caused by an upturned rail to a person driving on the street, an instruction that it was the duty of defendant to keep its track in proper repair, that this is a condition attendant on the grant of the franchise, and if it neglected to do so, by reason whereof plaintiff sustained injuries, defendant was negligent, and is liable to plaintiff therefor, if he did not in any way contribute by his own negligence to the injuries sustained, is not erroneous.—BRADWELL v. PITTSBURGH & W. E. PASS. RY. CO., Penn., 25 Atl. Rep. 623.

176. RAILROAD MORTGAGES — Foreclosure — Preferential Indebtedness.—In railroad foreclosure proceedings, preferential debts, which may be given priority on the appointment of a receiver, are in general those which have aided to conserve the property, and have been contracted within a reasonable time, and there is no fixed rule barring claims contracted more than six months before the appointment; nor is the authority to give priority limited to cases in which there has been a diversion of income.—FARMERS' LOAN & TRUST CO. v. KANSAS CITY W. & N. W. R. CO., U. S. C. C. (Kan.), 53 Fed. Rep. 182.

177. REMOVAL OF CAUSES — Bond. — Where the bond filed with a petition for the removal of a cause to a federal court is executed by two responsible persons, and the condition thereof is complied with, the statute requiring that "a bond, with good and sufficient surety," must be made and filed by the party desiring removal is substantially fulfilled, although such bond is not signed by the party seeking removal.—PEOPLE'S BANK OF GREENVILLE v. AETNA INS. CO., U. S. C. C. (S. Car.), 53 Fed. Rep. 161.

178. REMOVAL OF CAUSES—Citizens.—Where replevin is brought in a State court by a citizen of the State against the sheriff of a county therein to recover goods levied on by writ of attachment, and the plaintiffs in the attachment are substituted for the sheriff as defendants, they, although citizens of another State, are not entitled to remove the action of replevin to a circuit court of the United States, as the original defendant had no such right. — BURNHAM v. FIRST NAT. BANK OF LEOTI, U. S. C. C. of App., 53 Fed. Rep. 163.

179. REMOVAL OF CAUSES — Death by Wrongful Act.—Section 2 of the judiciary act of 1887-88 gives the right of removal from a State to a federal circuit court only when the latter court would have original jurisdiction under the first section. The first section gives the

circuit court original jurisdiction concurrent with the State courts "in all suits of a civil nature at common law or in equity," etc.: Held, that the phrase "common law" is here used in contradistinction to equity, admiralty, and maritime jurisdiction, and includes all cases involving "legal" rights, whether such rights arise from the settled principles of the common law or are given by statute; and hence a non-resident defendant may remove a suit brought under a State statute giving a right of action for wrongfully causing death. BRISENDEN V. CHAMBERLAIN, U. S. C. C. (S. Car.), 53 Fed. Rep. 307.

180. REMOVAL OF CAUSES — Diverse Citizenship. — A citizen of Massachusetts, who resides with his family in that State most of the year, but owns valuable real estate in South Carolina, where he comes once a year, or, at the furthest, two years, and spends a month, may remove from a South Carolina court to a federal court a suit brought against him by a citizen of South Carolina.—RIVERS V. BRADLEY, U. S. C. C. (S. Car.), 53 Fed. Rep. 305.

181. REMOVAL OF CAUSES — Railroad Rates. — In an action against a railroad company to enforce a schedule of rates adopted by the railroad commissioners, the court properly refused to remove the cause to the federal court on the ground that under Act Cong. July 25, 1866, its road in the State was made subject to national control only and therefore was not subject to State legislation; the act referred to giving defendant's lessor aid in the construction of the road, which in al other matters was to be governed by the law of the State. — STATE V. SOUTHERN PAC. CO., Oreg., 31 Pac. Rep. 960.

182. REMOVAL OF CAUSES — Separable Controversy.—In a suit brought in a State court by a citizen of the State against a railroad company, also a citizen of the State, setting up certain claims and liens, a trustee, representing the bondholders, was made a party defendant. Being a citizen of another State, the trustee removed the cause on the ground of a separate controversy between it and plaintiff: Held that, as any judgment determining the rights and fixing the priority of liens of plaintiff and the trustee would of necessity be against the railroad company, there was no separate controversy between the former two to justify a removal under the act of 1888, § 2, cl. 3. — MARSH V. ATLANTA & F. R. CO., U. S. C. C. (Ga.), 53 Fed. Rep. 168.

183. SALES—Agent's Authority.—An agent employed by a foreign manufacturer to solicit orders for goods must, as to innocent third persons dealing with him be deemed to have authority to accept the orders, and to enter into contracts of sale binding on his principal, where that is the general usage in the business, as conducted by such manufacturers through such agents, and where it is shown that such sales, entered into by the agent in question, had been repeatedly recognized by his employers.—AUSTRIAN V. SPRINGER, Mich., 54 N. W. Rep. 50.

184. SALE—Conditional.—A contract executed by two parties, wherein the party of the first part acknowledges receipt of a cash payment, and agrees, in consideration thereof and of a certain sum to be paid monthly thereafter for a stated term, to "rent" to the party of the second part for that term a certain piano, and upon the payment of the "rent," as stipulated, to give a receipt for the payment in full of the piano, is a contract of conditional sale. — ROSS V. MCDUFFIE, Ga., 16 S. E. Rep. 648.

185. SALE—Delivery.—Under a contract for the sale and shipment of hay, by which the shipper agreed to deliver the hay to the purchaser "on track at Denver," the delivery is complete, and title to the hay vests in the purchaser, when the cars containing the hay are left in the general receiving yards, at Denver, of the railroad by which they were hauled, it being unnecessary to such delivery that the cars be transferred to the tracks connected with the purchaser's warehouse. —A. WESTMAN MERCANTILE CO. V. PARK, Colo., 31 Pac. Rep. 945.

186. SALE—Parol Evidence.—Where a person enters into a written contract to sell and deliver a commodity parol evidence that he was only acting in the capacity of a broker in making the sale is properly excluded.—CREAM CITY GLASS CO. V. FRIEDLANDER, Wis., 54 N. W. Rep. 28.

187. SALE—Rescission.—A seller of stationary engines will not be relieved from his agreement to rescind the sale, and accept their return, by the mere fact that the purchaser returned one more engine than specified in the agreement, without, however, requiring its acceptance by the seller as a condition to the return of the others.—WILLARD V. TATUM, Cal., 31 Pac. Rep. 912.

188. SALE—Title.—Where the contract for the sale of logs provided for delivery in the river, cribbed and prepared for rafting, when final payment should be made, title does not pass from the seller before such delivery, though the buyer has advanced to the seller more than the price on the logs.—DAVIS V. MILLER, Miss., 12 South. Rep. 27.

189. SALE — Warranty. — Where a purchaser, when sued for lumber sold, sets up in defense that the vendor expressly warranted and fraudulently represented the lumber as sound, when in fact it was rotten; and it appears that no objection was made until nearly three months after discovery of the quality, and disposal of some of it, the purchaser is not entitled to a rescission of the contract, but, at most, to a recoupment of damages.—HOUSTON V. COOK, Pa., 25 Atl. Rep. 622.

190. SALE— Warranty— Damages.— The measure of damages recoverable for breach of warranty in the sale of an engine guarantied to have sufficient power to do certain work is to be determined by the difference between its market value for any purpose and its value as warranted.—HIMES V. KIEHL, Pa., 25 Atl. Rep. 632.

191. SALE OF INTEREST IN PARTNERSHIP. — Where a member of a partnership, the property of which is represented by transferable certificates of shares, transfers, with a warranty of title, his share, which has not been fully paid, he is liable to the transferee for the amount unpaid.—JAMISON V. HARBERT, Iowa, 54 N. W. Rep. 75.

192. SALE OF LAND TO CREDITORS.—A contract for the sale of land was made by debtors with their creditors, which recited that the creditors were within a reasonable time to ascertain the value of the land, by personal inspection or otherwise, and, after the actual cash value had been so ascertained, to apply the value of the land as payment of the debt: Held that, in the absence of fraud, the debtors are bound by the value as fixed by the creditors, and in an action against them inquiry need not be made as to what the actual cash value of the land was.—HARVEY V. VAN PATEN, Iowa, 54 N. W. Rep. 77.

193. SCHOOL—Contracts with Officers.—An agreement by the board of directors of an independent school district to employ one of their number as superintendent of the construction of a school building, and to pay him for such services, is void, and its performance may be restrained by a tax payer without showing any fraud upon the part of the contracting parties.—WEITZ V. INDEPENDENT DIST. OF DES MOINES, Iowa, 54 N. W. Rep. 70.

194. SCHOOLS—Taxation.—Where the school law requires the directors at their first annual meeting in each school year to ascertain by the precise means specified therein the rate of tax to be collected during the year for school purposes, and keep a minute thereof, a school tax assessed without such meeting and ascertainment is illegal, and a warrant for its collection is an absolute nullity.—IRVIN V. GILL, Pa., 25 Atl. Rep. 649.

195. SHIPPING—License.—Steam tugs engaged in the business of towing vessels from the Chicago river into the harbor and lake, and in bringing vessels from the lake into the river, are engaged in interstate and in foreign commerce, and if they possess a license to engage in the coasting and foreign trade, under Rev.

St. § 4321, they cannot be compelled to pay any further license fee to the city of Chicago, and a city ordinance requiring the same is void.—HARMON v. CITY OF CHICAGO, U. S. S. C., 13 S. C. Rep. 306.

196. SPECIFIC PERFORMANCE—Contract. — Defendant leased to plaintiffs a lot, and agreed that they might purchase it on or before a certain day at a stated price. Plaintiffs entered under the lease, and, with a view to its purchase, made improvements on the lot, but were unable to make payment of the purchase price until a few days after it was due, and defendant had gone away. On his return, 10 days after, plaintiffs tendered the purchase money and demanded a deed, which he refused: Held, that time of payment was not of the essence of the contract for the sale, and equity will compel specific performance.—WILSON v. HERBERT, Md., 25 Atl. Rep. 685.

197. STATE TREASURER—Interest on Deposits.—The State treasurer and the sureties on his official bond are liable to the State for interest received by the former from banks on State funds deposited therein by him, in his name, as such treasurer, with interest thereon from the close of his official term.—STATE v. HARSHAW, Wis., 54 N. W. Rep. 17.

198. STATE TREASURER—State Funds.—The State treasurer, in depositing public funds in banks in his official capacity, subject only to his official draft, and in stipulating for interest thereon, or receiving interest thereon without such stipulation, does not violate any law of the State.—STATE v. MCFETRIDGE, Wis., 54 N. W. Rep. 1.

199. STATUTES — Evidence.—When a question arises in a court of law as to the existence of a statute, or as to the time when a statute took effect, or as to the precise terms of a statute, the judge who is called upon to decide it has the right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to the question.—HOLLINGSWORTH v. THOMPSON, La., 12 South. Rep. 1.

200. TELEGRAPH COMPANIES— Damages.—A member of the plaintiff firm, after receiving instructions by telegraph, purchased a quantity of wool and delivered to the defendant telegraph company a message advising the firm thereof, telling the agent that the message was important, and that he thought his firm had probably contracted to sell the wool; and, to avoid any mistake, he had the agent transcribe the message, and signed the copy. The message was not delivered, and the price of wool when the firm first learned of the purchase had declined from the price at which they could had sold it if they had gotten the message. They sought to recover the difference as their damages: Held, that the damages were not too remote, uncertain, and contingent.—WESTERN UNION TEL. CO. v. HAMAN, Tex., 20 S. W. Rep. 1133.

201. TELEGRAPH COMPANIES— Municipal License.—A city ordinance, requiring telegraph companies engaged in business within the State in which such city is located, and which have a place of business in such city, to pay a license tax, is valid, in that it can be enforced without interfering with or violating any rights such companies may have under the interstate commerce law.—MOORE v. CITY OF EUFAULA, Ala., 11 South. Rep. 921.

202. TENDER—Vendor and Purchaser.—In an action for damages for failure to deliver a deed in accordance with a contract, it appeared that defendant agreed to make a conveyance of some lands to plaintiffs on or before a certain time, provided that plaintiffs should pay the unpaid price, and that plaintiffs, before the expiration of the time, offered, in writing to pay the balance, and demanded the deed: Held, under Civil Code, § 1496, providing that "the thing to be delivered need not be actually produced upon an offer of performance," that this offer was sufficient to impose upon defendant the obligation to tender the deed.—PECKHAM v. STEWART, Cal., 31 Pac. Rep. 928.

203. TRADE-MARKS.— The courts will not grant relief on a claim to the exclusive use of a trade-mark which contains a false representation, calculated to deceive the public, as to the manufacturer of an article, and the place where it is manufactured.—JOSEPH v. MCCOWSKY, Cal., 31 Pac. Rep. 914.

204. TRADE-NAMES.—Where manufacturers have made goods for many years, and put their name, "Draper," in various forms on the different articles, to denote their superior quality, they will acquire a right to the use of the name, and can make an assignment of its use to another.—H. A. WILLIAMS MANUF'G CO. v. NORA, Mass., 32 N. E. Rep. 1037.

205. TRESPASS TO TRY TITLE—Citing Warrantor—Adverse Possession.—A plaintiff in trespass to try title, as well as a defendant, has the right to have his warrantor cited to come into court and maintain the title conveyed by him, and make good his warranty.—NORTON v. COLLINS, Tex., 20 S. W. Rep. 1113.

206. TRESPASS TO TRY TITLE— Limitation.—In trespass to try title to land, defendant, to maintain the plea of five years' limitation must not only prove adverse and continuous possession for the necessary time but that his possession is under a duly-registered deed, describing the land.—MCCURDY v. LOCKER, Tex., 20 S. W. Rep. 1109.

207. TRIAL—Competency of Witness.—Where a witness is rejected for incompetency, it is not necessary that the record should show what evidence it was desired to produce by such witness, but it will be presumed on appeal that his testimony would have been material to the issue.—MCGINNIS v. STATE, Wyom., 31 Pac. Rep. 978.

208. TRIAL—Nonsuit.—Under Hill's Code, § 246, which provides that a nonsuit can be taken by plaintiff, at any time before the trial, unless a counter-claim had been pleaded as a defense, a nonsuit may be taken when a judgment has been reversed and the cause remanded because of an erroneous ruling, for then the cause stands for a trial *de novo*, as if no proceedings therein had been taken.—CURRIE v. SOUTHERN PAC. CO., Oreg., 31 Pac. Rep. 963.

209. TROVER—Pleading.—A petition in trover states a cause of action when it alleges that plaintiff was the owner of the property in question, describing it, and alleging its value, and that defendants wrongfully took and converted it to their own use.—ROBINSON v. PERU PLOW AND WHEEL CO., Okla., 31 Pac. Rep. 988.

210. TRUSTS—Construction of Deed.—Though a deed in trust does not contain the word "heirs," it vests the fee-simple title in the trustee, under Rev. St. 1879, § 3939, providing that "the term 'heirs' . . . shall be unnecessary to create or convey an estate in fee-simple."—EWING v. SHANNAHAN, Mo., 20 S. W. Rep. 1065.

211. TRUST DEED—Foreclosure.—A trust deed to an agent, to secure a certain note to his principals, provided that, if any one of the interest coupons should remain unpaid for five days after maturity, then, at the option of the payee, the whole sum should become due, and the trustee was authorized, at the request of said payees, after default, to sell the property, for cash or on credit, at the court house door, etc.: Held, that no declaration by the payees of their option to treat the whole debt as due for non-payment of interest was necessary to authorize their trustee to sell under the trust deed.—CHASE v. FIRST NAT. BANK OF CLEBURNE, Tex., 20 S. W. Rep. 1027.

212. TRUST DEED—Limitation.—Where, in an action to enjoin a sale under a trust deed on the ground that it has been merged in a judgment on the bond secured by it, the bill not only fails to plead the statute of limitations as to the judgment, but prays that the parties entitled to it be required to enforce it in the usual way, the statute is not available on appeal.—GIBSON v. GREEN'S ADM'R, Va., 16 S. E. Rep. 661.

213. VENDOR AND PURCHASER—Representations.—B entered into a contract for the sale of certain pine lands to W, who, after cutting a small portion of the pine, became insolvent, and assigned the contract to C.

C had no knowledge of estimating lumber, and before taking the contract asked B for some assurance that there was as much timber on the land of was represented in the contract. B then told him that the price was based on his (B's) estimate of the amount of timber; that his estimate was 22,000,000 feet of white pine and 8,000,000 feet of Norway, and that "it would cut more than our estimate:" Held, that B's representations were not mere expressions of opinion, but representations of fact, on which C had a right to rely; and, whether B was innocent of intent to deceive or not, he was liable for any damage resulting to C through such representations.—CHASE V. BOUGHTON, Mich., 54 N. W. Rep. 44.

214. VENDOR AND VENDEE—Covenant of Seisin.—A purchaser of vacant real estate, receiving a deed thereof, with a covenant of seisin, from one who has no title, the covenant being wholly broken, is not compelled, at least after he had commenced an action for the breach of the covenant, for the recovery of the purchase money paid, to accept a title which his grantor may then acquire.—RESSER V. CARNEY, Minn., 54 N. W. Rep. 89.

215. VENDOR AND VENDEE—Rescission.—Where, after the maturity of a note given for the purchase price of land, an action for its collection is brought by a *bona fide* transferee before maturity, it is too late to rescind the purchase of the land, and enjoin the collection of the note, because of an incumbrance on the land.—BRILL V. MERCHANTS' & PLANTERS' BANK, Miss., 12 South. Rep. 29.

216. VENDOR'S LIEN—Waiver—Mortgages.—A vendor's lien is not waived by his taking a mortgage, upon the land conveyed, to secure the purchaser's notes for the price.—TRIGG V. VERMILLION, Mo., 20 S. W. Rep. 1047.

217. WATERS — Riparian Rights—Damages.—Where the owner of vessels on a navigable river places them between high and low water mark in front of the property of another person, and keeps them there for an unreasonable time, making a profit out of such use of the land-owner's property, he is liable in damages for such use, since it is not an incident to the right of navigation.—WALL V. PITTSBURGH HARBOR CO., Penn., 25 Atl. Rep. 647.

218. WILL—Codicil.—W caused to be entered on a leaf of her bank book the name of M, under the words, "Name of person to whom, in the event of absence or death, the money shall be paid, unless otherwise disposed of," and this was witnessed by the assistant teller of the bank: Held, that this paper could not be admitted to probate as a valid codicil to a will; Code, art. 93, § 310, requiring all bequests of personal property to be in writing, signed by the testator, and attested and subscribed, in the presence of the testator, by two or more credible witnesses.—REMINGTON V. METROPOLITAN SAV. BANK OF BALTIMORE, Md., 25 Atl. Rep. 666.

219. WILL—Construction.—Testator devised his farm to his son D, providing that his widow should have a home there while she lived, and a third of the income. The will made D guardian of the money left to testator's son J, who was of age, but weak minded, and who was to remain on the farm with testator's wife "and my son D, who shall care for him in all his actual wants." D conveyed to H, the deed providing that the grantee, his heirs and assigns, should "be bounden by every obligation imposed" on D, his heirs and assigns, by the will: Held, where J voluntarily gave up the care of D, and afterwards abandoned his home on the farm, that the duty of care and a home for J was not charged on the land by the will nor by the conveyance to H.—PRINGLE V. MARSHALL, Penn., 25 Atl. Rep. 629.

220. WILLS—Devise to Illegitimate Children.—Under Gen. St. § 1866, which declares void any legacy, in excess of one fourth of testator's estate, to an illegitimate child of testator, or its mother, in exclusion of his lawful wife or children, where a testator, having lawful children, after devising to his illegitimate children one-fourth of his estate, devised a sum to his executor with an understanding that the latter should use such legacy, also, for the benefit of such illegitimate children, the legacy is void.—GORE V. CLARKE, S. Car., 16 S. E. Rep. 614.

221. WILL—Dower.—A will provided that, after the executors had sold the property of the estate "to such an extent as, in their judgment, will enable them to definitely decide the value of my entire estate," they should divide the estate into two parts, and should manage one of the parts so as to yield the best income, which was to be paid annually to his wife for her use during her life. Under the will she also took the household and kitchen furniture. The other part was bequeathed to the testator's brother: Held, that the widow, electing to take under the will, is not entitled to dower, the provisions in the will being intended by the testator as a substitute therefor.—BANNISTER V. BANNISTER, S. Car., 16 S. E. Rep. 612.

ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

ADMINISTRATION—Discovery of Assets — Sec. 74, Rev St. 1889—Construction of Sec. 75, Rev. St. 1889.—An affidavit was filed by plaintiffs, heirs of deceased, under sec. 74, charging defendant, wife of deceased, with converting to her own use certain personal property belonging to the estate of deceased and that she had the same in her possession. Defendant was cited to appear before probate court, did appear and was examined; administrator declined to file interrogatories whereupon probate court discharged defendant. Plaintiffs appealed. In circuit court defendant appeared and testified that she took possession of said property as well as of other property not inventoried. Plaintiffs thereupon asked leave to file interrogatories which court denied, on ground that administrator refused to file interrogatories as required by law, and dismissed plaintiffs' petition, which action of the court is error complained of: Held, that under sec. 75, Rev. St. all further proceedings, after a preliminary examination of a person cited is had, must take place at instance of administrator or executor. Affirmed.—BROTHERTON V. SPENCE.

ATTACHMENT — Interplea—Judgment.—In an attachment suit, the interpleader, respondent herein, after attached property had been sold by sheriff, under order of court wherein attachment suit was pending, obtained the following judgment, to-wit: "That possession of the said property above described be delivered to interpleader herein, and that he recover from plaintiff in attachment the costs and charges herein expended and that process issue therefor:" Held, that the court had no authority for the form of judgment shown in the record. The proper judgment which the court should have rendered upon proper findings was that interpleader "have and recover to the extent of his interest the proceeds arising from the sale of the goods by the sheriff, who is thereby ordered to pay such proceeds to interpleader." Reversed.—NELSON DISTILLING CO. V. HUBBARD.

CRIMINAL PRACTICE—Information —Sec. 3784, Rev. St 1889.—On motion to quash an information, charging defendant with disturbing the peace, the sufficiency of which is challenged by motion to quash on the grounds that several offenses were charged in one count, that defendant is not advised of what offense he stands charged, that indictment failed to set out the indecent and offensive conversation and what the noise consisted in: Held, the statute being construed to be leveled against the disturbance of the peace in the neighborhood etc., that the information following the language of the statute is sufficient and court erred in quashing it. Reversed.—STATE V. RAMSEY.

CRIMINAL PRACTICE — Indictment — Sec. 3854, Rev. S

1889.—In the trial upon an indictment under Sec. 3854, there was a variance between the indictment and the evidence, as to the "name" of one of the four players with whom the defendant is charged with unlawfully playing cards: held, that the defendant was properly convicted because it was unnecessary to allege or prove the names of the persons with whom he played, and as the statement of the names of the players could have been stricken out and a good indictment would have remained, the statement was not so far descriptive of a particular offense as to require proof. Affirmed.—STATE V. KELLAR.

DOWER—Will—Election.—In a suit by a widow against the administrator of the estate of her deceased husband, for the sum of four hundred dollars as part of her dower in the personal property of the estate, the defense being that provision had been made for the widow by the will in lieu of dower and that she had adopted the will. It was held that the clauses in the will, by which the entire property passed to the widow to be used and enjoyed by her for her sustenance so long as she remained a widow, and if necessary for her support, the entire property could be sold by her; and that in the event of a re-marriage, the plaintiff was to be endowed under the laws of the State, were repugnant to the idea of a present right of dower. Reversed.—SCHWALKEN V. DANDT.

JUDGMENT — Replevin — Pleading.—In an action of replevin for a saw mill wherein defendant, sheriff, on appeal assigns for error that the judgment of the trial court is unwarranted by the record because plaintiff's petition fails to state a cause of action: Held, as the petition may be aided by answer and since the answer is not in the record, that the judgment cannot be reversed for insufficiency in the petition even if objection were otherwise tenable. Affirmed.—KEEN V. MUNGER.

JUSTICE OF THE PEACE—Judgment—Scire Facias.—In a suit upon *scire facias* to revive a judgment in a justice's court, the judgment entry should declare that the judgment revived is still in force for whatever remains unpaid thereon, and should not capitalize the principal and interest accrued, but this objection cannot be taken for the first time in the appellate court. Affirmed.—SAPPINGTON V. LENZ.

MASTER AND SERVANT—Wages—Implied Contract.—Plaintiff seeks to recover wages upon an implied contract for the reasonable value of her services for thirteen years, rendered to defendant while living with defendant's family and regarded as one of them: Held, as the right of recovery in this class of actions depends upon the intention at the time services are rendered, and cannot be affected by a subsequent change of intention, there being no proof that services were rendered by plaintiff with an intention of being paid their reasonable value, or that defendant could have so understood her conduct, that plaintiff was properly non-suited. Affirmed.—BITTRICK V. GILMORE.

PRINCIPAL AND AGENT — Husband — Liability. — In a suit to recover compensation for cutting thirty-two and one-half cords of wood, held, that the fact that defendant, with whom plaintiff contracted through defendants' represenative at the farm, may have acted as the agent of his wife, and that this was known, will not relieve him from personal liability. As defendant's wife was, at the time, incapable of being sued, there being no evidence that the farm was her sole and separate property, defendant must be regarded as principal. —Affirmed.—HOPPE V. SAYLOR.

PRIVILEGED COMMUNICATIONS — Physician—Sec. 8925, Rev. St. 1889.—In a suit for damages for personal injuries the trial court excluded the testimony of a physician called as a witness by defendant, on the ground that his testimony was inadmissible under Sec. 8925. Held, that physician's testimony that he examined the patient to be enabled to prescribe for her, rendered him *prima facie* incompetent to testify to his knowledge derived from such examination. Affirmed. — WEITZ V. RAILWAY.

PRACTICE—Pleading—Statute of Frauds.—In an action to recover damages, for the breach of an implied warranty of authority by defendants as agents to make the contract for the sale of real property as set forth in the petition: Held, that the sufficiency of the memorandum of sale forming the foundation of plaintiff's cause of action, under the statute, cannot be raised for the first time in the appellate court; also that the defense of the statute of frauds was not properly raised in the trial court by a plea of the general issue. Affirmed.—MANTZ V. MAGUIRE.

RAILROADS—Fencing—Evidence.—In a suit against a railroad company for the killing of stock, it was held, that the opinion of a witness, unobjected to, that one of the animals was killed by the cars; proof that both animals were injured by a violent collision with some hard substance; evidence that the defendant operated the road in the immediate vicinity of which the animals were found in a crippled condition and that hair and blood were found on the rails and ties near the place where the animals were found; makes a *prima facie* case on the cause of injury which entitled the plaintiff to go to the jury on that question; and that a *prima facie* case that the animals came upon the track at a place where it was the duty of the defendant to fence its road and that the road at such point was not fenced was made by evidence tending to show that the place of apparent collision was not in the switch or yard limits of any town or city, nor on any road, and that the railroad at that point was not fenced. Affirmed —BATMAN V. RAILROAD.

RAILROADS—Fencing—Instructions.—In a suit agains a railroad for double damages for the killing of stock under section 2611, Rev. St. Mo. 1889, an instruction was given that if the jury found that the stock got upon the railroad track where the road was not fenced and not a public crossing, or in the limits of any town, and while on the track was struck and killed by the engine, they should find for the plaintiff: Held, that, although the instruction is open to the objection that it does not negative the idea that the animal may have come upon the track at a station, the proof showing that the sow was killed at a point where the railroad ran through unenclosed land and where there was no crossing, public or private highway and no switch nor station, and not within the limits of any town, the instruction is not reversible error. Affirmed. — LINDSAY V. RAILROAD.

SALE OF PERSONAL PROPERTY—Possession—Creditors. —In a suit between an attaching creditor and a person who claimed the goods as purchaser from the debtor, it was held, that an instruction, that if the jury find from the evidence that the goods were not delivered to the purchaser in a reasonable time after the sale, regard being had as to the situation of the property and such delivery was not followed by an actual and continued, open unequivocal change of the possession of the property sold, such sale was void as to creditors, was erroneous, as the requirements of the statute would be met by a delivery to the purchaser at any time prior to the seizure of the property by creditors. Reversed.—MARKEY V. UMSTATTD.

TRESPASS — Constable — Damages.—A, a constable, levied upon certain goods. While these goods were in his possession under the levy, they were levied upon by B, another constable, subsequent to this levied by B, A levied certain other executions on the goods. B unlawfully seized the goods and sold a part of them under his levy, A thereupon sold the remaining goods and realized enough from the sale to satisfy the execution under which he made his first levy. He now sues B for an unlawful seizure of the goods. It was held; that as plaintiff had only a special interest growing out of the first levy, to which only defendants right was subordinate, the recovery for trespass could not exceed the damages sustained on account of such special interest, which in this case would be nominal. Reversed.—ALLEN V. DAVIS.